Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

LESTER I. TENNEY, *et al.*,
Petitioners,

v.

MITSUI & CO., LTD., MITSUI & CO. (USA), INC., MITSUI MINING CO. LTD., and MITSUI MINING USA INC.,
Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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June 4, 2003

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QUESTIONS PRESENTED

1. Under the "well-pleaded complaint rule," do the federal courts have removal jurisdiction over lawsuits filed in State court and arising under State law, in which the relevant complaints disclose no federal basis for suit, solely because the defendants (and the United States as *amicus curiae*) contend that the actions are barred by a treaty of the United States?

2. Is it open to a federal appellate court to speculate as to how the highest court of a State would resolve a question of interpretation of State law, when the only two State appellate court decisions on point are in direct conflict and the matter is currently set for resolution by the State Supreme Court?

3. Does the 1951 Treaty of Peace with Japan, on a proper reading of all of its terms, prohibit the assertion of private causes of action by Americans against private Japanese companies that enslaved them, brutalized them, and profited from their unpaid labor, even though no treaty in the history of this Republic has ever been held by this Court to preclude the assertion of private rights of action by private citizens against foreign non-government defendants?

STATEMENT OF CORPORATE AFFILIATIONS

All Petitioners are individuals, and there are no corporate affiliations to disclose on their side.

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Petitioners Lester Tenney *et al.* respectfully petition for a writ of certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit, which affirmed a judgment of the United States District Court for the Northern District of California.

OPINIONS BELOW

The decision of the Ninth Circuit is reported *sub nom. Deutsch v. Turner Corporation*, at 317 F.3d 1005, *as amended at* 324 F.3d 692 (9th Cir. 2003). It is reprinted in the Appendix hereto ("App."), at pp. 1a-65a. This decision consolidated 28 cases brought by prisoners of war in the Pacific Theater, as well as one case initiated by a European Holocaust survivor. The instant Petition is filed on behalf of Plaintiffs in 11 of those cases, brought by American citizens who were enslaved by private Japanese companies.

The decision of the U.S. District Court for the Northern District of California is reported *sub nom. In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp.2d 939 (N.D. Cal. 2000). It is reprinted at App., pp. 66a-80a.

JURISDICTION

Rehearing and en banc reconsideration of the decision in the Ninth Circuit were denied on March 6, 2003. App., pp. 1a-16a. Pursuant to order of the appeals court, the mandate has not issued, pending this Court's disposition of *American Insurance Association v. Low*, 123 S. Ct. 817 (2003) (granting certiorari). *See* App., p. 16a. This stay of mandate does not, however, affect the timing of the instant Petition: *see* Rule 13.3 of the Rules of this Court.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

TREATIES AND STATUTES INVOLVED

The treaties and statutes at issue are certain articles of the Treaty of Peace with Japan, [1952] 3 U.S.T. 3169, TIAS 2490 (1951), reprinted at App., pp. 81a-114a, and California Code of Civil Procedure § 354.6, reprinted at App., 119a-120a.

STATEMENT OF THE CASE

1. The Facts of the Underlying Litigation.

Petitioners, all of whom are United States citizens, are the survivors of a group of true American heroes. Their claims are based on the brutal abuse they experienced at the hands of Japanese *zaibatsu* (private business conglomerates), including Respondents, after they were taken as prisoners of war in World War II, and were sold to those companies, which forced them to labor without compensation.[1]

Petitioners contended in their complaints, and are prepared to demonstrate at trial, that their abusers were acting not as agents of the Japanese government, but as profit-making enterprises, enriching themselves by imposing egregious deprivations on innocent Americans and other Allied POWs.

The sufferings imposed by the *zaibatsu* on these victims have been recounted from numerous perspectives. The perversity of the mistreatment of these men – outside the laws, customs, and conventions of war which all civilized nations were and are now obligated to honor -- will always remain a dark shadow over the history of the twentieth century.

Respondents, acting for their own war-profiteering purposes, exploited private commercial opportunities through Petitioners' forced labor. At least since 1945, these conglomerates have thrived beyond the wildest imaginings of which their principals would have been capable, either before or after the War. Privately-owned and -operated business entities, they could not have achieved these levels of success had they not survived to enrich themselves in the reinvigorated post-War Japanese economy; and they could not have survived the War without the uncompensated labor

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[1] Pursuant to California Code of Civil Procedure § 354.6, Petitioners also include the U.S.-incorporated affiliates of these Japanese business entities.

of POWs like these Petitioners, who were captured and pressed into slavery.

2. The State Court Litigation.

Petitioners brought these actions in California State courts to obtain a remedy, which they deserve as a matter not just of basic fairness but of law, against those who enslaved them, tortured them, and exploited their labor without mercy or compensation. These are not cases against the government of Japan, despite the unrelenting efforts of Respondents, supported by the Department of State, to characterize them in that way. They are founded in common law and equity, seeking tort damages, unpaid wages, and the restitution of unjust enrichment.

The cases were brought by private individuals against private commercial entities, seeking relief measured by the fruits of unpaid labor, and to recompense grievous wrongs committed by private employers against a segment of their workforce. Petitioners were permitted to bring these cases under an express extension of the statute of limitations adopted by the California State Legislature in 1999: California Code of Civil Procedure § 354.6 (*see* App., p. 115a-16a, *infra*).

The State court suits, in other words, arose under California law, and were filed in California courts. Nevertheless, they were removed to the federal courts, and ultimately transferred (with others as well) by the Judicial Panel on Multidistrict Litigation to the U.S. District Court for the Northern District of California, where they were consolidated by Judge Walker for pretrial purposes.

There is no basis for federal jurisdiction over these cases.[2] The complaints do not so much as make reference to federal law in their allegations of fact or prayers for relief.

Despite Respondents' attempts to portray Petitioners as seeking judicial review of acts and decisions consigned by

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[2] The presence of California plaintiffs and defendants precludes federal jurisdiction based on diversity of citizenship.

the Constitution exclusively to the competence of the federal government, and indeed to its Executive branch, these cases fall squarely within the scope of the authority of every State to assure the enforcement of wage claims, and to punish mistreatment of its citizens even when they are employed by foreign nationals or corporations. It is commonplace for State courts to hear and to adjudicate civil actions relating to refusals to pay wages and similar abusive conduct by foreign employers, so long as jurisdiction over the subject matter and the person of the defendant is properly lodged. That the events at issue here happened in Japan is no bar: courts in the United States regularly consider and resolve cases alleging actionable wrongdoing in other places.

Nevertheless, remand to State court was denied by Judge Walker, who proceeded to exercise jurisdiction over these cases.[3] Despite the subsequent holding of the Ninth Circuit in *Patrickson v. Dole Food Company, Inc.*, 251 F.3d 795 (9th Cir. 2001), *aff'd on other grounds*, 251 F.3d 795 (2003), the district court declined to revisit its decision.

3. Disposition in the District Court.

Before the district court, Respondents opposed Petitioners' motions to remand, and moved to dismiss or for judgment on the pleadings, on four grounds. They alleged that the claims were barred by: (a) the 1951 Treaty of Peace with Japan, [1952] 3 U.S.T. 3169, TIAS 2490 ("the Treaty") ; (b) the political question doctrine; (c) the preemptive effects of the Treaty, the War Claims Act of 1948, 50 U.S.C. §§ 2001-2017p, and "the federal government's plenary authority over foreign affairs"; and (d) the act of state doctrine and the Foreign Sovereign Immunities Act, 28 U.S.C. § 1601 *et seq.*

The district judge, after declining to remand the cases for lack of subject-matter jurisdiction, granted Respondents'

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[3] Other federal Judges did remand other Japanese Prisoner of War cases to California State courts, where they remain. *See, e.g., Mitsubishi Materials Corp. v. Superior Court*, 106 Cal. App. 4th 39 (2003) (discussed *infra* at p. 6).

motions, but for only one of the proffered reasons. He held that the Treaty unambiguously constituted a waiver of these causes of action. He found further support for this position in his analysis of the negotiation and ratification of the Treaty.

4. The Opinion of the Ninth Circuit.

The Ninth Circuit consolidated the cases brought by American citizen plaintiffs with litigation initiated by nationals of both signatories and non-signatories of the San Francisco Treaty. Also consolidated was an action brought by a European Holocaust survivor against a German company, alleging enslavement and pursuing a claim for damages.

The Ninth Circuit Panel issued an opinion far more limited in scope than that of Judge Walker below. The circuit court held that the section of the California Code of Civil Procedure extending the limitations period was a substantive, and hence an impermissible, intrusion by a State into the federal government's constitutional prerogative to conduct foreign affairs. The court opined that the federal resolution *inter alia* of the cases now at Bar was incorporated into the 1951 Treaty, effectively precluding the maintenance of these suits.

After concluding its analysis of the constitutionality of the State statute, the court went on to address the question of whether there was federal jurisdiction over these cases at all, or whether the district court should have remanded them to the State courts in which they were originally filed. The Panel found that it did not need to resolve this issue, because the outcome of State court litigation over the construction and acceptability of § 354.6 was a foregone conclusion.

In the amendment to its opinion issued six weeks later (on March 6, 2003) (*see* App., pp. 1a-16a), the court noted that two California Court of Appeal panels had recently issued decisions that reached precisely opposite holdings on the critical question of whether the statute was substantive or procedural in nature. One court found that

§ 354.6 impermissibly purported to create a cause of action that would not otherwise exist, while the other opined that the statute was merely a procedural extension of the limitations period, raising no constitutional issues. *Compare Mitsubishi Materials Corp. v. Superior Court*, 106 Cal. App. 4th 39 (Feb. 6, 2003) *with Taiheiyo Cement Corp. v. Superior Court*, 105 Cal. App. 4th 398, 129 Cal. Rptr. 2d 451 (Jan. 15, 2003). Apparently, the existence of this actual conflict was not sufficient to persuade the circuit court that the ultimate resolution of this critical question of State law by the California courts is open to doubt.

Meanwhile, on April 30, the State Supreme Court granted review of both of these cases, 2003 Cal. LEXIS 2794. Argument will be heard some time in the coming months.

5. What Is at Stake in These Cases.

Petitioners respectfully submit that the court below erred, both procedurally in concluding that there is federal jurisdiction over these suits, and also substantively in affirming the order of dismissal.

These are cases of enormous public importance, which have attracted considerable attention from the media, as well as from the political branches of government. Indeed, the attention they have drawn is well merited: in this time when U.S. servicemen and servicewomen are once again subject to capture as prisoners of war far from these shores, it is especially important to elucidate the legal rights of the American heroes who wore their country's uniform during World War Two, and for whom this Court now offers the last hope for vindication.

The Court may surely take notice of the fact that Petitioners are no longer young: having suffered unspeakable abuse in 1942-45, the youngest of the survivors is nearly 80 years of age. Many are substantially older than that. These men represent the finest of the generation that fought and won the Second World War, incurring enormous personal loss to preserve our way of life against severe and

imminent threats. They deserve the attention of the highest Court in the land, which should now address and resolve the important legal questions that they respectfully present in this Petition.

REASONS FOR GRANTING THE WRIT

A. The Federal Courts Are without Subject-Matter Jurisdiction in Cases Brought under State Law, in Which Any and All Federal Claims Are Asserted by the Defense.

The competence of the federal courts to hear cases is limited. They may adjudicate an action only if constitutional or statutory authority permits. *Marathon Oil Co. v. Ruhrgas AG* 115 F.3d 315, (5th Cir.) *cert. denied* 522 U.S. 967 (1997). And cases begun there may be removed from State courts only if they come within that restricted federal jurisdictional field. The remand statute, 28 U.S.C. § 1446(a), is strictly construed **against** federal jurisdiction, as this Court has repeatedly taught. "To bring a case within the [federal-question removal] statute, a right or immunity created by the Constitution or laws of the United States **must be an element, and an essential one, of the plaintiff's cause of action.**" *Caterpillar, Inc. v. Williams* 482 U.S. 386, 392 (1987) (emphasis added) (quoting *Gully v. First Nat'l Bank* 299 U.S. 109, (1936).

The federal nature of a cause -- and hence the special jurisdiction of the federal courts under 28 U.S.C. § 1331 -- may not be created, for example, by the **defense** to a claim, when the claim itself arises under State law. In *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 163 (1997), this Court described the "well-pleaded complaint rule" as "long settled law." Nor may a case be removed because the plaintiff **might** have asserted a federal claim but elected not to do so. *M. Nahas & Co., Inc. v. First National Bank of Hot Springs*, 930 F.2d 608, 611 (8th Cir. 1991) ("the plaintiff is master of his claim, and may avoid federal removal jurisdiction by exclusive reliance on State law").

Here, of course, the complaints themselves declare no federal cause of action: on the contrary, they are clearly framed to allege common law and equitable causes of action under the laws of the State of California. Removal, therefore, was at least presumptively improper: "original federal jurisdiction is unavailable unless it appears that some substantial disputed question of federal law is a **necessary element of one of the well-pleaded State claims**, or that one of the other claims is 'really' one of federal law." *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 13 (1982) (emphasis added).

At the district court, Judge Walker appears implicitly to have found that these cases come within an exception to the well-pleaded complaint rule, the so-called "complete preemption doctrine." When Congress has so thoroughly occupied and dominated an area as to leave no room for State law, **any** civil action will in essence be federal in character, and removal may be had no matter how the complaint is written. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987); *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 65-66 (1987).

Yet the very rulings that define the doctrine make clear its inapplicability to such cases as these. States are surely not preempted from regulating the fairness with which their citizens are treated in the workplace, or from providing a mechanism for redress of such grievances.

In *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987), this Court laid down the boundaries of the complete preemption doctrine. States may not regulate in a given field: (1) when Congress has made clear its intent to occupy the field exclusively, either by expressly prohibiting State involvement, or through a legislative framework leaving no room for State regulation; or (2) where there is an "actual conflict" between the requirements (or prohibitions) of State and federal law. 480 U.S. at 581 (citations omitted).

The key question, then, is whether Congress intended that State law be superseded by Federal law. *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, 2617 (1994). Common law claims, such as the claims at Bar of employees against employers, are the best example of those "traditionally governed by State law," as to which preemption will be most unlikely. *CSX Transportation, Inc. v. Easterwood*, 113 S.Ct. 1732, 1737 (1993). No federal statute purports in any manner to preempt these claims. And there are no obligations under federal law as to which these suits present an "actual conflict."

The "complete preemption doctrine" therefore does not apply to these lawsuits, which are concerned not with foreign affairs but with the right of workers to be paid, and not with diplomacy but with torts and equity. The plaintiffs' choice of the State court forum should be honored.

In the district court, Judge Walker claimed to follow "a line of cases committing to federal common law questions implicating the foreign relations of the United States," including *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398 (1964). "Under *Banco Nacional*," he wrote, "federal common law governs matters concerning the foreign relations of the United States." 114 F. Supp. 2d at 943 (citation omitted); App. 71a.[4] But this reasoning, too, is of

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[4] In its decision below, the court of appeals paraphrased with approval its earlier remark that "[t]he federal government's foreign affairs power is not mentioned expressly in the text of the Constitution but, rather, is derived from the structure of the Constitution and the nature of federalism." *Gerling Global Reins. Corp. of America v. Low*, 240 F.3d 739, 751 n.9 (9th Cir. 2001), *cert. granted sub nom. Am. Ins. Ass'n v. Low*, 71 U.S.L.W. 3470 (2003). "The power is rarely invoked by the courts; the Supreme Court has not applied it in more than 30 years," *id.*, since *Zschernig v. Miller,* 389 U.S. 429, 433-35 (1968). The circuit correctly noted this Court's holding that a statute will not be struck down if it has only "some incidental or indirect effect in foreign countries." *Clark v. Allen*, 331 U.S. 503, 517 (1947). 317 F.3d 1005, 1021-22; App. 51a.

no avail. *Banco Nacional* neither channels cases into the federal courts nor precludes State courts from hearing lawsuits properly before them. *Banco Nacional* is "best regarded not as authority for an expansive federal common law of foreign affairs." Curtis Bradley & Jack Goldsmith, "Customary International Law as Federal Common Law: A Critique of the Modern Position," 110 *Harv. L. Rev.* 815, 864 (1997). It is not judicial endorsement of the so-called "federal common law of foreign relations," nor does it establish a generalizable exception to the well-pleaded complaint rule.

Resolution of Petitioners' State law claims would not require that the trial court decide a substantive question of federal law. These claims do not "arise under" the laws of the United States within 28 U.S.C. § 1331, even if Respondents' answers and defenses are replete with reliance on federal law. *See Franchise Tax Bd v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 13 (1982), 463 U.S. at 13-14.

These cases should have been remanded, and it was reversible error to conclude otherwise. Respondents are by no means precluded from presenting their Treaty-based defenses in State court. And the disposition of those defenses is far from the foregone conclusion imagined by the appellate panel below. Indeed, the court's confidence that, on remand, "the State court would simply dismiss the claims with prejudice," 317 F.3d at 1030, is demonstrably erroneous.

B. A Federal Appellate Court May Not Resolve a Question of Interpretation of State Law, When the Only Two State Appellate Decisions on Point Are in Direct Conflict, and the Matter Is Currently Set for Resolution by the State Supreme Court.

The Ninth Circuit held that the extension of the statute of limitations in § 354.6 is unconstitutional as a substantive incursion by a State into the exclusive preserve of the federal government. The court considered its

interpretation of the State statute to be so clearly correct that it saw no reason to defer to the expertise and competence of the State judiciary.

Yet, in *Taiheiyo Cement Corp*, *supra*, decided in January of this year, a panel of the California Court of Appeal came to precisely the conclusion that the Ninth Circuit dismissed out of hand. The *Taiheiyo* court found that § 354.6 is "essentially a procedural statute designed to allow venue in the California courts." 105 Cal. App. 4th 398 at 423. Thus, there is no creation of a cause of action, no issue of constitutionality, and no incursion into the substantive regulation of foreign affairs that the federal appellate panel found the California Legislature to have committed.

"State courts are the principal expositors of State law." *Moore v. Sims*, 442 U.S. 415, 429 (1979). Federal courts, when they engage in that exercise, do so without "authoritative jurisdiction." *U.S. v. 37 Photographs*, 402 U.S. 363, 369 (1971).

Another panel of the same State court agreed with the Circuit, finding the statute to be substantive and therefore unenforceable, in *Mitsubishi Materials Corp, supra*, decided three weeks after *Taiheiyo*. The conflict in the interpretation of a State statute is now precisely where it should be in our federal system: the California Supreme Court has granted review to both decisions, and will resolve the matter in due course.

The interpretation of State law by the federal appellate panel below is entitled to no weight. The California Supreme Court will soon ultimately and authoritatively pronounce on whether the proper reading of the statute is as procedural or substantive. The decision below is grounded in a violation of a fundamental tenet of federalism, and should be set aside.

C. The Treaty of Peace with Japan Did Not Bar Actions by Private American Citizens Against the Private Japanese Companies That Mistreated and Enslaved Them.

The court below did **not** conclude that it is impermissible for California to have enacted **any** legislation purporting to regulate the rights of Californians who were victims of wrongs during World War Two. There would be no basis for such an unprecedented incursion by the federal courts into the authority of a State Legislature to protect its citizenry. The real problem, according to the opinion penned by Judge Reinhardt, is the alleged substantive inconsistency between California's enactment, under which these Petitioners have a cause of action against these Respondents, and the Treaty of Peace, which the panel believed waived such actions.

Petitioners respectfully submit that the panel erred in its interpretation of the Treaty, no reading of which can concoct a waiver of claims of private United States citizens against private entities organized under the laws of the former Axis powers. It therefore was incorrect in its conclusion that § 354.6 "is impermissible because it intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims." 317 F.3d 1005, 1023; App. at 47a. To the contrary, a proper reading of the document in its entirety and in its context demonstrates that these claims were **not** "resolved" by the Treaty.

As noted below, Article 14(b) of the Treaty of Peace makes reference to the waiver, subject to certain exceptions, of "all reparations claims" of U.S. nationals against Japan and Japanese nationals "arising out of any actions taken by Japan and its nationals in the course of the prosecution of the War." Yet those words by their very terms do **not** waive **all** claims (whether "reparations claims" or not) of U.S. **prisoners of war** against Japanese companies (whether "arising out of . . . the prosecution of the War" or not), merely by virtue of the fact that they arose **during** the War years. This distinction is underscored by the express waiver, by Japan in Article 19(b), of the claims of its prisoners of war.

Having incorrectly held Article 14(b) to be a "resolution" of the claims at Bar, the panel also erred in rejecting Petitioners' arguments based on the language of an Article of the Treaty itself, under which certain claims, even if otherwise barred, were automatically revived in the event and to the extent that Japan later made "a peace settlement or war claims settlement with any State granting that State **greater advantages** than those provided by the present Treaty." Treaty of Peace, Article 26, emphasis added.

These conclusions are incorrect as a matter of law, and are inconsistent with teachings of this Court over decades. In reaching them, the court below "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory powers." Rule 10(a). Moreover, the questions resolved by the appellate court are important questions of federal law "that ha[ve] not been, but should be, settled by this Court. Rule 10(b).

1. The Treaty Did Not Bar All Prisoner of War Claims.

Article 14(b) of the Treaty of Peace is clear:

> Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

To the extent that Article 14(b) might affect claims of United States **nationals**, such as Petitioners, against Japanese **nationals**, such as Respondents, any waiver is expressly limited in two respects: (a) it is subject to whatever might be "otherwise provided" in the Treaty; and (b) it embraces only claims "arising out of any actions taken by Japan[ese] nationals in the course of the prosecution of the war." An

analysis of these limitations demonstrates that Article 14 does not constitute an effective waiver of the cases at Bar.

a. Other Provisions of the Treaty Limit the Waiver of Claims in Article 14.

The proper test for interpreting treaty language was laid down by this Court in *Eastern Air Lines Inc. v. Floyd*, 499 U.S. 530, 534-35 (1991): interpretation of a treaty requires a close scrutiny of its text provisions **taken as a whole**. On such a reading, the drafters' intent **not** to bar private claims of Allied prisoners of war against the Japanese companies that enslaved them emerges unscathed. Article 14(b), which addresses waivers of **certain** claims of Allied nationals, has to be read in the context provided by Article 19, the parallel provision governing Japanese waivers. Neither exists in a vacuum. Understanding Article 14(b), therefore, and determining whether it is a "resolution" of war claims that bars State action, requires some analysis of Article 19.

In Article 19(a), Japan waived claims in language very much broader than what was accepted by the Allies in Article 14(b). Article 19 embraces not only claims resulting from actions taken in the course of prosecution of the War, but also "all claims . . . **arising out of the War** or **out of actions taken because of the existence of a state of war**." Emphasis added. Both the words and the history of this provision leave no room for doubt that it was intended to cover far more situations than would come within Article 14(b). Yet if even the more extensive scope of Article 19(a) does not unambiguously encompass and bar claims like Respondents', then surely Article 14(b) cannot be read to do so either.

The negotiators and drafters wrote Article 19(b) to include critically important language specifying that the waiver "includes . . . any claims and debts arising in respect to Japanese prisoners of war and civilian internees in the hands of the Allied Powers." Such language, or indeed **any**

express reference to claims to be asserted by Allied POWs or civilian internees, is absent from Article 14(b).

The venerable maxim "*expressio unius est exclusio alterius*" is a proper guide to interpreting treaties, just as it is for statutory enactments. It requires the conclusion that, in expressly addressing prisoner of war claims in Article 19(b), the drafters **excluded** those claims from the scope of the waiver in Article 14(b). *See* Lord McNair, *The Law of Treaties* (1938), chapter XVIII, pp. 199-206. The context of the Treaty thus fills in the meaning of Article 14(b). It is a vital part of the judicial function to mine that context, and thus to discern the meaning of the Treaty as "the supreme law of the land."

The court below made no attempt to reconcile its broad interpretation of Article 14(b) as "resolving" war claims with the language of the Treaty as a whole, giving meaning to all of its terms. Article 19 contains "other provisions," which limit the reach of the waiver language of Article 14, and exclude common law claims of private U.S. citizens against private Japanese business entities.

Articles 14(b) and 19 must be read together, not because there would be ambiguity in one or both of them standing alone, but because they deal with related subject matters, and, therefore, each provides guidance as to how the other should be understood. To fail to perform this contextual analysis, and therefore to conclude that Article 14(b) must be read as if it were a free-standing legislative instrument, violates this Court's teaching, articulated most clearly by Justice Scalia in *Chan v. Korean Air Lines*, 490 U.S. 122 (1989): the judiciary must not insert into treaties words that are just not there. The courts may not amend the Treaty of Peace with Japan to import language that the drafters did not write into it. Article 14(b) may not be transformed into the mirror image of Article 19, from which it differs in critical ways, by importing words that the drafters did not employ.

The negotiating history -- the *travaux préparatoires* -- of the Treaty reinforces this conclusion. The historical record demonstrates without qualification or condition that the negotiators **deleted** an express reference to prisoner of war claims in Article 14(b), while retaining such a reference and expanding the scope of the waiver in Article 19(b).

Excerpts from the record,[5] which were before the district court below, show that the penultimate draft of the Treaty, dated June 1, 1951, included two elements relating to the scope of waivers which were changed by the negotiators in the final version. First, draft Article 15(d)[6] provided:

> Except as otherwise provided in the present Treaty, reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals (including juridical persons) arising out of any actions taken by Japan and its nationals **in the course of the prosecution of the war (including claims arising out of the treatment accorded by Japan to prisoners of war and civilian internees)**, and claims of the Allied Powers for direct military costs of occupation shall be deemed to be satisfied out of the Japanese assets subject to their respective jurisdiction in accordance with the foregoing and out of assets received from the Japanese home islands during occupation.

VI *Foreign Relations of the United States* (1951), at 1082.

Draft Article 19, by contrast, provided, in words which mirrored the waiver language ultimately incorporated in Article 14(b), that:

> (a) Japan waives all claims of Japan and its nationals (including juridical persons) against

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[5] Those excerpts are taken from VI *Foreign Relations of the United States* (1951), pp. 1074-1101.

[6] This provision was renumbered in the final text as Article 14(b).

> the Allied Powers and their nationals (including juridical persons) **arising out of any actions taken by said powers and their nationals in the course of the prosecution of the war**, and waives all claims arising from the presence, operations or actions of forces or authorities of any of the Allied Powers in Japanese territory proper to the coming into force of the present Treaty.
>
> (b) The foregoing waiver includes any claims arising out of actions taken by any of the Allied Powers with respect to Japanese ships between September 1, 1939, and the coming into force of the present Treaty, **as well as any claims arising out of the treatment accorded by the Allied Powers to prisoners of war and civilian internees.**

Id., at 1093-94 (emphasis added).

The negotiators' treatment of the emphasized language demonstrates two propositions that cannot be ignored in any fair canvass of the *travaux préparatoires*: (1) the waiver provisions in the June 1, 1951 draft were originally worded to reflect each other **exactly**, with **both** limited to claims arising "out of the prosecution of the war," and (2) by dealing specifically with prisoner of war claims, **both** draft provisions addressed the negotiators' perception that the scope of the "prosecution of the war" phraseology, without elaboration, would not extend unambiguously to such claims. The negotiating history further shows that even this waiver, expressly including POW claims, was viewed at least by the British as **still** insufficiently broad to protect their Government against claims by Japanese prisoners of war. The U.K. representatives therefore sought, and obtained, the even broader, clearer waiver ultimately ratified as Article 19 in the final version of the Treaty. *Id.*, at 1095.

The exchanges between U.S. and British negotiators over the language of Articles 14(b) and 19 demonstrate that,

in the U.K. view, even with textual references to include prisoner of war claims expressly, the "prosecution of the war" waiver still would not be broad enough "to extinguish all types of claims which the Japanese could raise against the Allies under the 1929 Geneva Convention on Prisoners of War or in respect of Japanese surrendered personnel." Furthermore, to overcome any perceived limited scope of the draft waiver, the negotiators redrafted its language between June and September 1951, expanding the Japanese waiver in Article 19(b) to **include** all claims arising **during** the war, while **deleting** from Article 14(b) all language relating to prisoner of war claims.

All of the traditional guides to the interpretation of Article 14(b) of the Treaty -- its unambiguous language read in the context of the whole instrument, the canons of interpretation, and the *travaux préparatoires* -- lead to a single conclusion: Article 14(b) was not intended to bar the claims of Allied nationals held as prisoners of war by Japan, and forced to work to enrich private Japanese entities. These claims were not, therefore, even purportedly "resolved" by the Treaty, as the court below held, and the Treaty, therefore, does **not** evidence exclusive federal occupation of this area of constitutional territory.

b. Petitioners' Claims Did Not, in Fact, Arise from Actions Taken "in the Course of Prosecution of the War."

The second express textual limitation on the scope of the Treaty waiver clause is to actions taken "in the course of the prosecution of the War." Petitioners have already shown that the *travaux préparatoires* of the Treaty do **not** support the bald assertion that prisoner-of-war claims came within the drafters' understanding of the scope of the Article 14 waiver. The British negotiators expressly sought broader language to bar potential claims by Japanese internees against the Allies. And this fully comports with the international law regime for treatment of detained persons

during wartime, which applied to Japan and to the Allied Powers during World War Two.

Under the international law of war (*jus in bello*) applicable to all nations in the years 1939-45, the assignment of prisoner of war laborers to work for private parties was legal and acceptable **only** if their tasks had "**no connection** with the operations of the war."[7] If so assigned, laborers had to be paid "at rates in force for work of a similar kind," with their wages going "towards improving their position, and the balance shall be paid them on their release, after deducting the cost of their maintenance." Hague Convention on the Law of War on Land, 36 Stat. 2277, T.S. 539 (1907), Article 6 (emphasis added); *see also* Geneva Convention Relating to the Treatment of Prisoners of War, 47 Stat. 2021, T.S. 846 (1929), Article 31.[8]

If Petitioners' allegations regarding their enslavement are true, then either Respondents acted illegally under international law, or their actions were not undertaken "in prosecution of the war." A successful showing by Respondents that their use of Petitioners' uncompensated, forced labor was "in the prosecution of the War" would constitute an admission of illegal acts, tantamount to a confession that the *zaibatsu* were perpetrators of war crimes. Yet the public record discloses no such confession in the years immediately following Japan's surrender, and no prosecution of any Japanese corporate officer for having used prisoners of war illegally. Unless Respondents are now prepared to admit that they committed such war crimes, they cannot take advantage of the waiver language in Article

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[7] International law also barred the assignment of "excessive" work to civilian internees.

[8] "[L]abor furnished by prisoners of war shall have no direct relation with the war operations. It is especially prohibited to use prisoners for manufacturing and transporting arms or munitions of any kind or for transporting material intended for combatant units." Geneva Convention Relating to the Treatment of Prisoners of War, Article 31.

14(b) as a matter of law.[9] And such a belated confession, offered in an attempt to obtain the shelter of Article 14(b), would violate the cardinal rule of domestic and international legal systems that no one should be permitted to profit from his own wrong.

Moreover, it is not only **not** self-evident, but it is demonstrably incorrect, that no distinction can be made between the Japanese Imperial government and the industries that supplied its economic base during the War. That very distinction was advocated by the United States and endorsed by this Court in *Kawakita v. United States*, 343 U.S. 717, 726 (1952) (although "[t]he regulation of the company by the Japanese government, the freezing of its labor force, the assignment to it of prisoners of war under military command were incidents of a war economy," it does **not** follow that the company was acting as part of the war effort, or that it somehow ceased to be "an organization operating for private profit under private management").

Petitioners have alleged, in well-pleaded complaints, that they were enslaved by Respondents during the War: that they were abused in various ways, and that they were forced to work without compensation in order to enrich private interests. That enrichment occurred, of course, in substantial measure because the *zaibatsu* were engaged in the supply of goods and services in support of the Japanese wartime economy. But that fact made those businesses identical to or agents of the Imperial government no more than Lockheed, Boeing, or any farmer or coal miner became indistinguishable from the United States by virtue of having supplied the American economy with transportation equipment or food products consumed during the Second

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[9] The Hague and Geneva Conventions are appropriate guides for the understanding and application of the terms of the 1951 San Francisco Peace Treaty. *See* Article 11.

World War, the Gulf War, or the current War on Terrorism. That Dow Chemical manufactured Agent Orange for use in Vietnam does not imply that its factory workers acted "in the course of the prosecution" of the Vietnam War.

Respondents, therefore, cannot demonstrate that, as a matter of fact, their exaction of Petitioners' labor was in the "prosecution of the war" as that phrase was used in the Treaty.[10] Article 14(b) does not take away the right of POWs to sue their abusers, because Petitioners' claims are not within the categories that the language of the Treaty embraces. The conclusion of the court below that Article 14(b) "resolves" these claims must therefore be reversed.

c. Petitioners' Claims Neither Are, Nor Are Similar to, "Reparations" Claims.

The Treaty, in Article 14(b), purports to waive "all **reparations** claims of the Allied Powers, [and] **other** claims of the Allied Powers **and their nationals** . . ." (emphasis added). Although this language would appear to reflect a common understanding that the claims of nationals (such as those of POWs), as opposed to claims of the Allies themselves, are not "reparations claims," Petitioners submit that theirs are so **dissimilar** to reparations claims that they cannot be included in the catch-all word "other."

Reparations -- a term of art in international law then and now -- are payments made **by governments** for injuries inflicted in the course of hostilities. They are paid, typically and traditionally, also **to governments**, for distribution, often according to a negotiated formula or procedure, to those able to prove that they were victims of the

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[10] There is nothing counterintuitive about this result. The words "the prosecution of the War," in their common meanings, refer to what **governments** do. It is governments, acting through, among others, their nationals in their military service, that make wars: private companies such as Respondents may be enlisted in their aid, but they cannot be said to be "prosecuting" (*i.e.*, spearheading, carrying out) the war effort merely because they continue to operate their businesses during wartime. The prosecution of wars in this country is a military function. *See* 32 C.F.R. § 368.6.

belligerency. Thus, in the *Reparations for Injuries Suffered in the Service of the United Nations Case*, [1949] I.C.J. 174, the International Court of Justice was called upon to advise whether the United Nations had sufficient international legal personality – enough resemblance to a nation – to be able to demand "reparations" from the nascent State of Israel for the murder of Count Bernadotte, the U.N. peacekeeper in Jerusalem, by commandos operating under what was to become the Israeli military structure.

Furthermore, it is true that Article 14(b) of the Treaty sets out a waiver of reparations claims "and other claims," but this language must properly be construed according to the rule of textual interpretation usually called *ejusdem generis*: the general items in a list must be read as members of the same family as the specific ones. *United States v. Espy*, 145 F.3d 1369 (D.C. Cir. 1998); *Melugin v. Hames*, 38 F.3d 1478 (9th Cir. 1994). The use of terms like "and others" or "etc." is not the way in which entire classes of unspoken assumptions are expressed, or important personal rights of untold numbers of people gained and lost. The breadth of the category of "reparations claims [and] other claims" does not extend to private claims of private individuals against private companies, unless those claims arose from actions taken "in prosecution of the War": in other words, unless they are of the same family of claims as the others waived in Article 14.

2. Any Treaty Waiver of Petitioners' Claims Was Superseded by Subsequent Developments.

Both to ensure fairness to those nations that did not resolve their war claims against Japan through the 1951 Treaty, and to avoid prejudice to the Allied Powers that were parties to that instrument, it was agreed as follows:

> Japan will be prepared to conclude with any State which signed or adhered to the United Nations Declaration of January 1, 1942, and which is at war with Japan . . . which is not a signatory of the present Treaty, a bilateral

> Treaty of Peace on the same or substantially the same terms as are provided for in the present Treaty. . . . Should Japan make a peace settlement or war claims settlement with any State granting that State **greater advantages** than those provided by the present Treaty, the same advantages **shall** be extended to the parties to the present Treaty.

Article 26, emphasis added. The text, ratified by the President of the United States after receiving the advice and consent of the Senate, included this language, which is every bit as much "the supreme law of the land," under Article VI of the Constitution, as the remainder of the Treaty's provisions.

In fact, Japan did subsequently make a number of "peace settlement[s] or war claims settlement[s] . . . granting [certain] State[s] . . . advantages" that were "greater . . . than those provided by" the San Francisco document, to the extent that it has been interpreted by the courts below to include a renunciation of national-vs.-national claims. Certain states other than the listed Peace Treaty signatories were granted settlements without waivers of private claims: an obvious advantage for their nationals, in comparison with the situation of United States citizens whose claims the panel below found to have been sacrificed by their government. Thus, even if the court below were correct in its interpretation of Article 14(b), those advantages would automatically be extended to the United States, according to the express language of Article 26.

On another point, the court below agreed with the district court in its interpretation of this Treaty provision, concluding that it "confers rights only on the 'parties' to the treaties, not on individuals."[11] 317 F.3d 1005, 1026; App.,

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[11] Judge Walker's conclusion, adopted by the Ninth Circuit., is also internally inconsistent or at least asymmetric. On that reading, Article 14(b) extends rights only to governments, not to private entities, such as Petitioners here. Yet the reading below permits Respondents the right to

p. 51a. But the provision of the Treaty **does** in fact "confer rights" on individuals, because it is part of United States law, and it contains express language to the effect that the United States "shall" have the "greater advantages" given by Japan to other nations. Since the record clearly indicates that the United States has never renounced these rights, there is no basis for the refusal of the courts below to take note of Japan's own subsequent actions, made relevant (indeed, made essential) to this analysis by the express language of Article 26.

Article 26 is a "most-favored-nation clause," a species of draftsmanship often seen in commercial contracts. It means that if either party extends a preference to any other entity at any later time, as compared with the instant contract partner, that benefit is immediately and automatically extended to the other without the need for a new agreement or any implementation. Thus, in *Kolovrat v. Oregon*, 366 U.S. 187, 193-96 (1961), this Court unanimously interpreted an 1881 treaty between the United States and Serbia, 60 Stat. 1401, T.I.A.S. 1501, containing a most-favored-nation clause, in light of both a pre-existing treaty of the United States (as it happened, one with Argentina, 10 Stat. 1005 (1853)), and later treaties between Serbia and Poland and Czechoslovakia (30 L.N.T.S. 185; 85 L.N.T.S. 455). The Court found the greater advantages contained in those documents to govern, recognizing that most-favored-nation clauses have "long [been] used to broaden the scope of rights protected by treaties." 366 U.S. at 195.

There is nothing unusual or counterintuitive about the concept that the rights of Americans may be interpreted in light of subsequent developments in the international arena. Identifying the operative principles and binding norms of international law may well require analysis of what other

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rely upon and to hide behind a supposed waiver of claims against them, while denying Petitioners any reciprocal right to enforce provisions which serve to explain, limit, or terminate the effect of that waiver.

countries do or have done, but that focus is well within the traditional mainstream of American jurisprudence.

That customary and conventional international law is part of the law of the United States, and has been so since the earliest days of the Republic, is far beyond dispute. Justice Gray's famous pronouncement in *The Paquete Habana*, 177 U.S. 677, 700(1900), is precisely this: "International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for their determination."

When, as in *The Paquete Habana* or *Kolovrat*, a legal instrument such as a Presidential Proclamation or a treaty makes reference to the possibility of subsequent development, there is no contradiction in defining the content of domestic law by reference to, and therefore as potentially to be changed by, those later events. Here, the Treaty says not that its text becomes null and void, or is subject to renegotiation, should another war claims settlement agreement involving Japan confer greater benefits on another country. It says that those additional advantages **shall** be extended to the Treaty parties, including the United States. No "right" to "invoke" this provision need be asserted by anyone. The conclusion below that the United States government must perform some affirmative act to be entitled to this provision is simply without authority in the Treaty text or the relevant caselaw.

Petitioners' contention, therefore, is grounded in the very words of the Treaty: if another nation settles its war claims with Japan in a way that does **not** deprive its citizens of the right to pursue judicial remedies for wrongs done by private Japanese interests, then American citizens "shall" have the same right. Even if such claims had been deemed "waived" before the date of such a more advantageous agreement, from that date forward, U.S. law would no longer be obligated to treat them as waived. The Treaty requires

Japan to extend the corresponding advantages to the U.S. automatically, and thus by extension to its nationals.

At least three war claims settlements of Japan do not purport to abandon, or otherwise to affect in any manner, claims against Japanese nationals, by whomsoever they might be asserted, or whenever they may have arisen. Rather, they expressly waive claims only against Japan's government.

Japan's agreement with Denmark[12] extends only to the Japanese government, and does not release claims against Japanese nationals: *see* Article III. The agreement between Japan and Sweden[13] is identical. The agreement between Japan and Spain[14] addresses the settlement of "certain types" of Spanish war claims, providing only for full and final discharge of the government of Japan for claims against it, making no reference to, and therefore offering no release of, claims between nationals of the two countries.

All of these provisions are clearly more advantageous than those in Article 14(b) of the Treaty, if that language is read – as the appeals court read it below – as precluding Petitioners' claims: they permit the pursuit of legal actions by private citizens against private companies. By the explicit language of the San Francisco Treaty, therefore, the right to bring the actions at Bar, not even purportedly affected by these other instruments signed by Japan, automatically re-vested in citizens of the United States, even if the Treaty were to be construed as having taken those rights away.

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[12] Arrangement between the Governments of Japan and Denmark Regarding Settlement of Certain Danish Claims (May 25, 1959), [1960] *Japanese Annual of Int'l Law* 203.

[13] Arrangement Between the Governments of Japan and Sweden Regarding Settlement of Certain Swedish Claims (September 20, 1957), [1959] *Japanese Annual of Int'l Law* 186.

[14] Exchange of Notes Between the Government of Japan and the Government of Spain Regarding the Settlement of the Problem Concerning Certain Types of Spanish Claims (January 8, 1957), [1958] *Japanese Annual of Int'l Law* 211.

The very existence of these three war claims settlement agreements, therefore, considered in light of the language of Article 26, and the express exception in the Article 14(b) waiver itself regarding what is "otherwise provided" in the Treaty, means that private claims by United States nationals against any national of Japan -- including the Japanese-incorporated Appellees named in these actions – are **not** foreclosed by Article 14(b).

Japan also entered into an agreement with the Soviet Union, which **did** purport to waive claims by Soviets against Japanese citizens.[15] The scope of that waiver, however, was expressly limited to claims that arose after August 9, 1945: claims arising before then were unaddressed. Petitioners' claims, however, arose significantly before that date, just days before the unconditional Japanese surrender. The agreement with the Soviet Union too, therefore, confers "advantages" not extended to the United States, assuming that the interpretation of the Treaty in the court below is correct.

Petitioners urge the Court to consider carefully and critically the very words of the Treaty itself which expressly, in light of the subsequent conduct of Japan, recognize their right to pursue private lawsuits alleging misconduct by Japanese non-government entities during the War. Nationals of certain other nations that later settled their claims with Japan have not lost their right to sue individual wrongdoers: an "advantage" that the decision below, if allowed to stand, would deny to U.S. citizens. The Treaty rectifies that imbalance, and the Treaty, including Article 26, is part of the laws of our country that the courts are bound to interpret and to apply.

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[15] *See* Joint Declarations by the Union Soviet Socialist Republics and Japan (October 19, 1956), [1957] U.N.T.S. 112, ¶ 6.

3. The Treaty Must Be Read Narrowly, So As Not to Deprive Americans of the Right to Pursue "National versus National" Claims.

There is another reason for Petitioners' position that the Treaty does not purport to deprive them of their private claims, and so does not represent a federal "resolution" that precludes the California statute. The Treaty should be presumed to be constitutional, requiring a reading in which it did not take the rights of American citizens away from them without compensation, as required under the Fifth Amendment, unless no other interpretation is possible.

This Court provided a comprehensive overview of the powers of the President in this area in *Dames & Moore v. Regan*, 453 U.S. 654 (1981). *Dames & Moore,* however, says nothing about "national versus national" claims. Rather, in *Dames & Moore*, the Court addressed the Algiers Accords, an agreement that affected claims by nationals of the U.S. only against the Government of Iran, along with its agencies and instrumentalities, not private Iranian citizens or interests.

Petitioners do not contest the proposition that a sovereign government like ours may settle the claims of its nationals against foreign states. That is an aspect of sovereignty recognized in international law. But under United States constitutional law, the uncompensated "taking" of a viable claim, which is a property right, is unconstitutional. *Id.*, at 688-690. Adhering to the principle that executive action in the formation of international undertakings should be presumed to be consistent with the Constitution, Petitioners submit that an interpretation of the Treaty as not depriving Americans of their right to property is to be preferred.

That the waiver of "national versus national" claims would implicate constitutional limits on the powers to make treaties or to conduct foreign relations is not an assertion concocted out of whole cloth by Petitioners. This is the very position taken by the United States Government recently

regarding the settlement of forced labor claims by Holocaust victims against German companies.

On July 17, 2000, the President entered into Executive Agreements with the Federal Republic of Germany concerning the resolution of Holocaust-related claims (including forced labor claims) against German nationals and German companies, through the establishment of a foundation, "Remembrance, Responsibility and the Future." In those Agreements, however, the President took precisely the position urged by Petitioners: that claims like theirs are simply not his to negotiate away. *See* excerpts at pp. 121a-131a, *infra*.

The United States recognized "the importance of . . . all-embracing and enduring legal peace," although acknowledging that private lawsuits had been brought in the federal courts. Noting that "it would be in the foreign policy interests of the United States" for the Foundation "to be the exclusive remedy" for resolving Holocaust claims by U.S. nationals against German companies, and that dismissal of the private lawsuits was therefore desirable, the government could do no more than commit that **it** "will not raise any reparations claims against the Federal Republic of Germany," and undertake that it would "**recommend** dismissal [of pending national versus national lawsuits] on any valid ground." Agreement between the U.S. and Germany, signed July 17, 2000, Annex B, ¶ 3, App. p. 125a (emphasis added).

Thus the Executive Branch expressly **rejected** Germany's demand that Holocaust-related forced labor claims be waived by government fiat. The United States took the position that whether or not these claims could be pursued in U.S. courts was "under the U.S. system of jurisprudence, for the U.S. courts to determine." *Id.* The United States could take "no position here on the merits of the legal claims in arguments advanced by plaintiffs or defendants. The United States does not suggest that its policy interests concerning the Foundation in themselves

provide an independent legal basis for dismissal." *Id.* at ¶ 7; *see also* S. D. Murphy, "Nazi-Era Claims Against German Companies, 94 *Am. J. Int'l L.* 682, 683-84 (2000).

The conclusions of the court below in this regard are also inconsistent with the clearly-expressed intent of the actual negotiators of the San Francisco Treaty with respect to the scope of Article 14(b). The U.S. negotiating team wanted an unrestricted, broad waiver of all wartime claims. Yet it is beyond challenge that Ambassador (later Secretary of State) John Foster Dulles was forced to compromise on that goal, because other Treaty partners rejected it in whole or in part.

The court below simply assumed that the federal government has the authority to waive "national versus national" claims, and that it did so in this case. But such a move would have been utterly unprecedented in American history. The negotiators themselves did not intend the Article 14(b) waiver to extend to "national claims under private law." This is further support for the view that Article 14(b) must be construed narrowly, leaving unaffected the rights of U.S. nationals to pursue private claims against Japanese nationals.

The court below, in misconstruing the Treaty, reached the erroneous conclusion that the federal government has somehow precluded the State of California from enacting legislative measures to protect its citizens and others, who may come into court to defend rights accruing under the statutes and common law of the State. That conclusion is unwarranted as a matter of law, and should be reversed.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue.

Respectfully submitted,

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JOSEF TIBOR DEUTSCH, an individual; JOSEF TIBOR DEUTSCH, as the survivor of George Deutsch, Plaintiffs-Appellants, v. TURNER CORPORATION, a Delaware Corporation with corporate regional headquarters located in California; KITCHELL CORPORATION USA, an Arizona Corporation authorized to do business in California; HOCHTIEF AG, a German Corporation, Defendants-Appellees. WOODROW M. HUTCHISON, Plaintiff-Appellant, v. MITSUBISHI MATERIALS CORPORATION; MITSUBISHI MATERIALS USA, a business association purporting to be a California corporation; MITSUBISHI CORPORATION, a Japanese business association; MITSUBISHI INTERNATIONAL CORPORATION, a business association purporting to be a New York corporation; MITSUBISHI HEAVY INDUSTRIES, LTD., a Japanese business association; MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., a business association purporting to be a Delaware corporation, Defendants-Appellees. LESTER

I. TENNY, Plaintiff-Appellant, v. MITSUI & CO. LTD., a Japanese business association; MITSUI & CO (USA), INC, a business association purporting to be a New York Corporation; MITSUI MINING CO LTD, a Japanese business association; MITSUI MINING USA INC, a business association purporting to be a Delaware corp, Defendants-Appellees. SHIRLEY M. RUBENSTEIN; JULIA E. STEVENSON; GLEN LEROY, individually and on behalf of a class of persons similarly situated, Plaintiffs-Appellants, v. ISHIHARA SANGYO KAISHA, LTD; ISHIHARA CORPORATION, a California corporation; ISK AMERICAS, INC., a Delaware corporation, Defendants-Appellees. RAYMOND HEIMBUCH; VIVIAN O. JOHNSON; WILLIAM R. LOWE; SAM P. BUSE; ALFRED BEREST; EDWIN F. LINDROS; MICHAEL BIBIN; J. S. GRAY; KARL WILLIAM HOLT; NORMAN R. MATTHEWS; DARREL D. STARK; CARMEL ZIPETO, Plaintiffs-Appellants, v. ISHIHARA SANGYO KAISHA, LTD, a Japanese business association; ISHIHARA CORPORATION; ISK

AMERICAS, INC., a business association purporting to be a Delaware corporation, Defendants-Appellees. MELODY SOLIS, individually and on behalf of a class of persons similarly situated, Plaintiff-Appellant, v. NIPPON STEEL CORPORATION, a Japanese business association; NIPPON STEEL TRADING CO., LTD., a Japanese business association; NIPPON STEEL USA INC, a business association purporting to be a New York corporation; NIPPON STEEL TRADING AMERICA, Defendants-Appellees. HARRY CORRE, Plaintiff-Appellant, v. MITSUI & CO. LTD; MITSUI & COMPANY (USA), INC.; MITSUI MINING USA INC; MITSUI MINING CO., LTD., Defendants-Appellees. GARTH G. DUNN, Plaintiff-Appellant, v. NIPPON STEEL CORPORATION, a Japanese business association; NIPPON STEEL USA, a business association purporting to be a New York Corp., Defendants-Appellees, and JAPAN IRON & STEEL, a Japanese business association; YAWATA IRON & STEEL, a Japanese business association; FUJI IRON & STEEL, a Japanese business

association; MITSUBISHI CORPORATION, a Japanese business association; MITSUBISHI SHOJI; SUMITOMO CORP.; SUMITOMO COMMERCIAL COMPANY, a Japanese business association, Defendants. JAMES O. KING, Plaintiff-Appellant, v. NIPPON STEEL CORP; NIPPON STEEL USA, Defendants-Appellees. PERFECTO LLANZA, on his own behalf and on behalf of all others similarly situated; ALBERTO SALDEJENO; ACELOPIO GALEDO; GENEROSO JACOB; ERNESTO SANTO DOMINGO; IMELDA SANTO DOMINGO, Plaintiffs-Appellants, MITSUI & CO (USA), INC, a business association; MITSUI MINING CO., LTD., a Japanese business association; MITSUBISHI CORPORATION; NIPPON STEEL CORP, a Japanese business association; NIPPON STEEL USA INC., Defendants-Appellees. ALBERTO SALDAJENO; ACELOPIO GALEDO; GENEROSO JACOB, individually and on behalf of a class of persons similarly situated; PERFECTO LLANZA; ERNESTO SANTO DOMINGO; IMELDA SANTO DOMINGO,

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business association; MITSUBISHI MATERIALS USA CORPORATION, a business association; MITSUBISHI CORPORATION, a business association; MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., a business association, Defendants-Appellees. ARTHUR TITHERINGTON; HENRY GEORGE BLACKHAM; FERGUS DUNSMORE MCGHIE, on behalf of themselves and others similarly situated, Plaintiffs-Appellants, v. JAPAN ENERGY CORP, a Japanese business association; JAPAN ENERGY USA, a Delaware Corporation; IRVINE SCIENTIFIC SALES, a California Corporation, Defendants-Appellees. FINNIE B PRICE, On behalf of himself and all others similarly situated, Plaintiff-Appellant, v. MITSUBISHI CORPORATION; MITSUBISHI HEAVY INDUSTRIES, LTD., a corporation; MITSUBISHI HEAVY INDUSTRIES AMERICA INC.; MITSUBISHI INTERNATIONAL CORPORATION, a corporation; MITSUI & CO (USA) INC.; MITSUI & CO. LTD., a corporation; MITSUI MINING

CO LTD; MITSUI MINING USA INC, a corporation, Defendants-Appellees.

No. 00-56673, No. 01-17115, No. 01-17116, No. 01-17123, No. 01-17124, No. 01-17134, No. 01-17155, No. 01-17157, No. 01-17160, No. 01-17172, No. 01-17176, No. 01-17177, No. 01-17185, No. 01-17189, No. 01-17195, No. 01-17197, No. 01-17201, No. 01-17203, No. 01-17204, No. 01-17207, No. 01-17210, No. 01-17211, No. 01-17230, No. 01-17243, No. 01-17251, No. 01-17252, No. 01-17260, No. 01-17265, No. 01-17499

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ORDER AMENDING OPINION

ORDER

The opinion filed January 21, 2003 is hereby amended as follows:

1. Slip op. at 991, second [*2] full paragraph, line 6, after "because a state is," insert "generally."
2. Slip op. at 991, replace the last sentence (beginning "Because section 354.6 is substantive law"), including footnote 4, with the following:

Nevertheless, that distinction does not affect the outcome here. Our determination of the foreign affairs doctrine issue does not depend on our conclusion that section 354.6 is substantive law. Whether substantive or procedural, section 354.6 creates a special rule that applies only to a newly defined class of tort actions – actions brought by Second World War slave labor victims against the entities that enslaved them. This new rule profoundly alters the likelihood that such actions will succeed, by not only extending the statute of limitations for claims that were timely when the statute took effect (although we doubt that any such claims existed), but, far more important, by reviving claims that were already time-barred. In the latter instance, the statute upset the repose of potential defendants. Such a revival of liability – even civil liability – is troubling and raises serious due process questions. We need not address those questions here, however. The important [*3] point for our foreign affairs analysis is that the California legislature created – or at least resurrected – a special class of tort actions, with the aim of rectifying wartime wrongs committed by our enemies or by parties operating under our enemies' protection.

3. Immediately following the passage inserted above (after "under our enemies' protection") add a new footnote containing the following text:

Two decisions of the California Court of Appeal, one by the Second Appellate District and one by the Fourth, have recently addressed whether section 354.6 is substantive or procedural in nature. The decisions reached opposite conclusions. Compare Mitsubishi Materials Corp v. Superior Court, 2003 Cal. App. LEXIS 182, No. G030056, slip op. at 2 (Cal. Ct. App. Feb. 6, 2003) ("The legislation actually creates a state law claim which otherwise would not exist . . . .") with Taiheiyo

Cement Corp. v. Superior Court, 105 Cal. App. 4th 398; 129 Cal. Rptr. 2d 451, slip op. at 24 (Cal. Ct. App., 2003) ("The sole purpose of section 354.6 is to extend the statute of limitations for common law claims for unpaid labor and personal injuries arising out of slave or forced labor."). Both decisions were issued after our opinion [*4] was sent to the Clerk for filing.

4. Slip op. at 1005, replace the first full paragraph with the following:

Section 354.6 runs afoul of the restriction on the exercise of foreign affairs powers by the states. Because California lacks the power to create a right of action – or, alternatively, to resurrect time-barred claims – in order to provide its own remedy for war-related injuries inflicted by our former enemies and those who operated in their territories, we hold that section 354.6 is unconstitutional.

With these amendments, the panel has voted unanimously to deny the petitions for rehearing and rehearing en banc. The full court has been advised of the petitions for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. 35. The petitions for rehearing and rehearing en banc are denied.

The mandate will be held pending a decision in American Insurance Association v. Low, 154 L. Ed. 2d 768, 123 S. Ct. 817 (2003) (No. 02-722) (granting certiorari).

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business association; MITSUBISHI MATERIALS USA CORPORATION, a business association; MITSUBISHI CORPORATION, a business association; MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., a business association, Defendants-Appellees. ARTHUR TITHERINGTON; HENRY GEORGE BLACKHAM; FERGUS DUNSMORE MCGHIE, on behalf of themselves and others similarly situated, Plaintiffs-Appellants, v. JAPAN ENERGY CORP, a Japanese business association; JAPAN ENERGY USA, a Delaware Corporation; IRVINE SCIENTIFIC SALES, a California Corporation, Defendants-Appellees. FINNIE B PRICE, On behalf of himself and all others similarly situated, Plaintiff-Appellant, v. MITSUBISHI CORPORATION; MITSUBISHI HEAVY INDUSTRIES, LTD., a corporation; MITSUBISHI HEAVY INDUSTRIES AMERICA INC.; MITSUBISHI INTERNATIONAL CORPORATION, a corporation; MITSUI & CO (USA) INC.; MITSUI & CO. LTD., a corporation; MITSUI MINING

CO LTD; MITSUI MINING USA INC, a corporation, Defendants-Appellees.

No. 00-56673, No. 01-17115, No. 01-17116, No. 01-17123, No. 01-17124, No. 01-17134, No. 01-17155, No. 01-17157, No. 01-17160, No. 01-17172, No. 01-17176, No. 01-17177, No. 01-17185, No. 01-17189, No. 01-17195, No. 01-17197, No. 01-17201, No. 01-17203, No. 01-17204, No. 01-17207, No. 01-17210, No. 01-17211, No. 01-17230, No. 01-17243, No. 01-17251, No. 01-17252, No. 01-17260, No. 01-17265, No. 01-17499

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

317 F.3d 1005; 2003 U.S. App. LEXIS 850

January 21, 2003, Filed

PRIOR HISTORY:

Appeal from the United States District Court for the Central District of California. D.C. No. CV-00-04405-SVW. Stephen V. Wilson, District Judge, Presiding. Appeal from the United States District Court for the Northern District of California. D.C. No. CV-00-02163-VRW, D.C. No. CV-00-02357-

VRW, D.C. No. CV-00-03737-VRW, D.C. No. CV-00-00064-VRW, D.C. No. CV-00-02359-VRW, D.C. No. CV-00-02690-VRW, D.C. No. CV-00-03239-VRW, D.C. No. CV-99-05042-VRW, D.C. No. CV-00-03240-VRW, D.C. Nos. CV-00-02960-VRW, CV-00-03240-VRW, CV-00-03828-VRW, D.C. No. CV-00-03828-VRW, D.C. No. CV-00-02691-VRW, D.C. No. CV-99-01554-VRW, D.C. No. CV-00-02360-VRW, D.C. No. CV-99-05303-VRW, D.C. No. CV-01-02592-VRW, D.C. No. CV-00-03242-VRW, D.C. No. CV-00-03313-VRW, D.C. No. CV-00-02358-VRW, D.C. No. CV-00-04278-VRW, D.C. No. CV-99-05309-VRW, D.C. No. CV-00-03530-VRW, D.C. No. CV-00-03586-VRW, D.C. No. CV-00-03752-VRW, D.C. No. CV-00-04277-VRW, D.C. No. CV-00-03648-VRW, D.C. No. CV-00-02689-VRW, D.C. No. CV-00-02761-VRW. Vaughn R. Walker, District Judge, Presiding. *In re World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d 1153; 2001 U.S. Dist. LEXIS 14641.*

DISPOSITION:

Judgments of the district courts affirmed.

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JUDGES:
Before: Stephen Reinhardt, Stephen S. Trott and Barry G. Silverman, Circuit Judges. Opinion by Judge Reinhardt.

OPINIONBY:
Stephen Reinhardt

OPINION:

REINHARDT, Circuit Judge:

Plaintiffs-Appellants in these consolidated cases allege that they were forced to work as slave laborers for German and Japanese corporations during the Second World War. They seek damages and other remedies for lost wages and for other atrocious injuries they suffered in the course of their forced labor. Defendants-Appellees are corporations (or successors or affiliates of those corporations) that allegedly committed these atrocities.

A California statute passed in 1999 creates a cause of action against such defendants for claims involving Second World War slave labor. n1 Cal. Code Civ. Proc. § 354.6. Under the statute, these claims are not time-barred if commenced on or before December 31, 2010. *Id.* Although Appellants assert a variety of statutory and common law claims for relief, all raise section 354.6 as the primary basis for bringing their suits so many years after the alleged wrongs were committed. Reluctantly, we hold that section 354.6 is invalid under the United States Constitution and that in its absence Appellants' remaining claims are time-barred.

n1 Although the statute distinguishes between "slave laborers," *see* Cal. Code Civ. Proc. § 354.6(a)(1), and "forced laborers," *see* § 354.6(a)(2), the distinction is generally immaterial to the analysis in this opinion. We generally use the term "slave laborer" to refer to both categories of workers.

Background

These cases concern the terrible abuses that German and Japanese corporate interests inflicted both on civilians and on soldiers captured by German and Japanese military forces during the Second World War. The corporations and their managers, with the cooperation and encouragement of their governments, subjected many individuals to vicious cruelties and forced them to work long hours without pay. The slave workers were often underfed, physically beaten, exposed to dangerous conditions, and denied medical care; many were murdered, and others died as a result of the maltreatment they suffered. Among these slave laborers were, tragically, many who became victims of the Holocaust, the most atrocious act ever perpetrated by a civilized (or uncivilized) people, an act unparalleled in history. Indeed, the Holocaust represents the worst historic manifestation of the perpetual human condition known as anti-Semitism, a phenomenon that is still thriving in all too many parts of the world today. n2

n2 It is plainly Holocaust survivors who are the intended beneficiaries of section 354.6, which speaks of "concentration camps" and "ghettoss," mentions no power by name other than the "Nazi regime," and never employs the term "Axis Powers," which is the usual collective term for the enemies of the Allied Powers. Ironically, among the hundreds of thousands of plaintiffs in the cases before us, there is only one Holocaust survivor. All the other plaintiffs suffered their injuries in Asia at the hands of Japanese companies. Whatever the intended purpose of the California statute, the text of section 354.6 appears to be broad enough to encompass all the plaintiffs' claims, and not just those of the one Holocaust survivor. We follow the district court and all the parties before us in assuming that such is the case.

I. The Cases

A. *Deutsch v. Turner*

The suit by Appellant Josef Tibor Deutsch ("Deutsch") is the only action before us concerning wrongs committed by German rather than Japanese corporations and the only action that was not consolidated with other cases by the district court. It is, in other words, the only Holocaust case at issue here, and it, unlike most of the Japanese cases, involves only a single plaintiff.

Currently a resident of California, Deutsch, a Jew, was born and raised in Hungary. Deutsch asserts that, in 1944, when he was a child, the Nazis took over his town and transported him and his brother Georg to Auschwitz. There the brothers were tortured and forced to work as slaves for 14-hour days, seven days a week. Their work was for the benefit of private corporations, which entered into agreements with the Nazi government, whereby they paid the Nazis less than the prevailing wage for the work of the slaves. The corporations for which the Deutsch children labored included Appellee Hochtief AG ("Hochtief"), one of Germany's largest and oldest construction companies. A civilian employee of Hochtief overseeing the slave laborers in their work for Hochtief beat Deutsch's brother Georg. Georg ultimately died from his injuries. By a stroke of good fortune, Deutsch, unlike most of his coreligionists, survived.

On April 7, 2000, Deutsch filed a complaint in the Superior Court of California against Hochtief, its wholly owned subsidiary the Turner Corporation, a Delaware corporation, and the Kitchell Corporation, an Arizona corporation that Hochtief owns in part. Deutsch alleged intentional infliction of emotional distress, unlawful business practices under the California Business and Professions Code, quantum meruit, and wrongful death. The action was removed to federal court on the ground of diversity jurisdiction.

Deutsch's basis for bringing the action so long after the alleged acts is section 354.6 of the California Code of Civil Procedure, which confers jurisdiction on the Superior Court to hear claims by "any Second World War slave labor victim" or "Second World War forced labor victim," or their heirs, against "any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate." Cal. Code Civ. Proc. § 354.6(b). Section 354.6 permits such actions to be brought on or before December 31, 2010, regardless of any otherwise applicable statute of limitations. § 354.6(c).

The district court dismissed the action as presenting a non-justiciable political question. *Deutsch v. Turner*, No. CV 00-4405 (C.D. Cal. Aug. 25, 2000).

B. *In re World War II Era Japanese Forced Labor Litigation*

The consolidated appeal before us also involves 28 other suits, all by victims and heirs of victims against Japanese business entities. Some were brought as class actions. Because there are so many complaints, and because the precise factual allegations do not bear on our decision, we do not here recount the details of the injuries that the various Appellants endured. Unlike Deutsch, these individuals -- some civilians, some soldiers who were prisoners of war -- were not selected because of their religious affiliation and were not victims of an overall plan to exterminate an ethnic or religious group. Rather, they became subject to the Japanese slave labor program either because they opposed the Japanese war efforts, in one capacity or another, or simply because they were in the wrong place at the wrong time. In any event, they were all subjected to serious mistreatment, including starvation, beatings, physical and mental torture, being transported in unventilated cargo holds of ships, and being forced to make long marches under a tropical sun without water. Some survived, while others were ultimately executed, or died from disease or physical abuse.

Twenty-seven of the suits against the Japanese corporate interests were originally brought in California Superior Court, while one was initiated in the United States District Court for the Central District of California. The claimants demanded damages and other relief, raising claims under California Code of Civil Procedure section 354.6, and alleging, variously, assault and battery, unjust enrichment, conspiracy, false imprisonment, intentional infliction of emotional distress, conversion, quantum meruit, unfair business practices under California Business and Professions Code sections 17200 *et seq.*, involuntary servitude under California Penal Code section 181 and Article I, § 6 of the California Constitution, and violations of international law under the Alien Tort Claims Act, *28 U.S.C. § 1350.* As defendants they name both Japanese corporations that they allege committed the injuries and successors and affiliates of those corporations. The suits filed in state court were removed to federal court; all were then consolidated in the Northern District of California. The district court denied motions to remand and dismissed all claims.

Appellants in the majority of the Japanese cases were, at the time of the occurrences that form the basis for these lawsuits, nationals of the United States or of other Allied nations. Many were in military service and were taken as prisoners of war. The district judge dismissed these cases on the ground that they were barred by a provision of the Treaty of Peace ending the war between the Allied Powers and Japan. n3 *In re World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939, 944-49 (N.D. Cal. 2000)* (*Forced Labor (Allied I)*); *In re World War II Era Japanese Forced Labor Litig.*, No. MDL-1347 (N.D. Cal. Feb. 8, 2001) (*Forced Labor (Allied* II)); *In re World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d 1153, 1157 (N.D. Cal. 2001)* (*Forced Labor (Filipinos)*).

n3 The provision that had this effect is Article 14(b), which provides as follows:

> Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.
>
> Treaty of Peace with Japan, Sept. 8, 1951, art. 14(b), *3 U.S.T. 3169,* T.I.A.S. No. 2490. The district court held that claims by Allied nationals against Japanese corporations were barred under the clause waiving "other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." *Forced Labor (Allied I), 114 F. Supp. 2d at 944-49 (N.D. Cal. 2000).*

Appellants in the remaining cases were Korean and Chinese nationals. The district court held that their claims were not affected by the Treaty of Peace between the Allies and Japan, because these claimaints were not Allied nationals or nationals of any signatory of that treaty. *In re World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d 1160, 1165-68 (N.D. Cal. 2001)* (*Forced Labor (Koreans)*). The court dismissed these cases nonetheless, on the grounds that section 354.6 was an unconstitutional intrusion on the foreign affairs powers of the United States, and that the remaining claims were time-barred. *Id. at 1168-78.*

II. Constitutionality of Section 354.6 Under Foreign Affairs Doctrine

A. Section 354.6 and Its Effect

All Appellants rely on section 354.6 of the California Code of Civil Procedure. Because it can best be understood when read as a whole, we quote it in full:

§ 354.6.

(a) As used in this section:

(1) "Second World War slave labor victim" means any person taken from a concentration camp or ghetto or diverted from transportation to a concentration camp or from a ghetto to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers.

(2) "Second World War forced labor victim" means any person who was a member of the civilian population conquered by the Nazi regime, its allies or sympathizers, or prisoner-of-war of the Nazi regime, its allies or sympathizers, forced to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers.

(3) "Compensation" means the present value of wages and benefits that individuals should have been paid and damages for injuries sustained in connection with the labor performed. Present value shall be calculated on the basis of the market value of the services at the time they were performed, plus interest from the time the services were performed, compounded annually to date of full payment

without diminution for wartime or post-war currency devaluation.

(b) Any Second World War slave labor victim, or heir of a Second World War slave labor victim, Second World War forced labor victim, or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate. That action may be brought in a superior court of this state, which court shall have jurisdiction over that action until its completion or resolution.

(c) Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010.

Appellants and the State of California as amicus seek to characterize section 354.6 as a purely procedural measure by reducing its scope to the provision regarding the limitations, as set forth in subsection (c). The entire effect of section 354.6, they argue, is to extend the statute of limitations for claims that are already available to remedy Nazi-era slave labor. They cite an impressive range of possible sources of substantive law prohibiting slave labor, including state statutes and common law, the United States Constitution, and international law. The reference in subsection (c) to "the applicable statute of limitations" supports their interpretation: If a statute of limitations is already "applicable," perhaps it is because subsection (c) contemplates a pre-existing cause of action, rather than a cause of action created under section 354.6.

However, section 354.6 can be viewed as purely procedural only when subsection (c) is viewed in isolation from the rest of the provision. Most important, the first

sentence of subsection (b) explicitly creates a cause of action by providing that certain individuals "may bring an action" for certain wrongs. *See Verizon Md. Inc. v. Pub. Serv. Comm'n, 535 U.S. 635, ___, 535 U.S. 635, 122 S. Ct. 1753, 1759, 152 L. Ed. 2d 871 (2002)* (noting that language in a statute providing that party "may bring an action" "reads like the conferral of a private right of action"). Appellants' recitation of pre-existing causes of action for slave labor, whether under other statutes or other bodies of law, is therefore fruitless. Regardless of any pre-existing law, the California legislature chose to create a specific cause of action for persons subjected to slave labor by the Nazis and their allies and sympathizers. If confirmation of this reading is required, it is found in those passages of section 354.6 that set forth the details of the new cause of action. The section defines the class of plaintiffs who may sue under that cause of action, *see* § 354.6(a)(1), (2), sets the method for measuring damages, *see* § 354.6(a)(3), and establishes a special rule regarding liability of corporations affiliated with the wrong-doer, *see* § 354.6(b). Even the language of the statute of limitations provision itself limits the application of the statute of limitations to "actions brought under this section," thus confirming that section 354.6 creates a cause of action.

Appellants' only remaining argument for the procedural nature of section 354.6 is its placement within the Code of Civil Procedure, in Title Two: Time of Commencing Civil Actions. However, [HN1] where the meaning of a statutory provision is clear, we do not rely upon the location the legislature chose for it in its system of codification, *see Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C., 111 F.3d 1322, 1328 (7th Cir. 1997),* just as we do not rely upon the headings and titles of sections in such circumstances. *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R., 331 U.S. 519, 528-29, 91 L. Ed. 1646, 67 S. Ct. 1387 (1947).* The reason for the placement of section 354.6 within the procedural code is, in any event, not difficult to explain: The

most striking aspect of the section is, indeed, its statute of limitations, which would allow the commencement of a suit more than 60 years after the occurrence of the injury. *Id.* Section 354.6's placement, therefore, does not change our view that the section is substantive in nature.

The parties debate whether section 354.6 is substantive or procedural primarily in the context of the Appellees' due process challenge, which we do not address. The substantive nature of the provision, however, is relevant also to the foreign affairs doctrine analysis in which we engage below, because a state is more likely to exceed the limits of its power when it seeks to alter or create rights and obligations than when it seeks merely to further enforcement of already existing rights and duties. Because section 354.6 is substantive law, we do not have occasion to address whether the extension of the statute of limitations, without more, would be legally permissible. n4

n4 Even if it were merely procedural, section 354.6 would go further than merely extending the statute of limitations for existing claims; it would actually revive claims that had been previously time-barred, thus upsetting the repose of potential defendants. This revival of liability -- even civil liability -- is troubling. We do not address here whether such a revival violates due process.

B. Foreign Affairs Doctrine Analysis

Appellees argue that section 354.6 exceeds California's power to engage in foreign affairs. We agree. n5

n5 Some Appellants assert that federal jurisdiction is lacking over their claims. We address that issue below.

The Constitution does not create an express, general power over foreign affairs but rather allocates particular powers related to foreign affairs to particular federal actors. It appoints the President as "Commander in Chief of the Army and Navy of the United States," U.S. Const., art. II, § 2, cl. 1, and authorizes him to "make Treaties, provided two thirds of the Senators present concur," to "appoint Ambassadors" with the "Advice and Consent of the Senate," *id.* cl. 2, and to "receive Ambassadors and other public Ministers," *id.* § 3. It grants to Congress the power to "lay and collect ... Duties, Imposts, and Excises," to "provide for the common Defence," *id.* art. I, § 8, cl. 1, to "regulate Commerce with foreign Nations," *id.* art. I, § 8, cl. 3, to "establish an uniform Rule of Naturalization," *id.* cl. 4, to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," *id.* cl. 10, to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," *id.* cl. 11, to "raise and support Armies," *id.* cl. 12, to "provide and maintain a Navy," *id.* cl. 13, and to regulate "the land and naval forces," *id.* cl. 14.

While the Constitution allocates these foreign affairs powers specifically to the federal government, it also expressly prohibits the states from exercising certain foreign relations powers, including both some of those expressly allocated to the federal government and a few others. [HN2] "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal" or, without consent of Congress, "lay any Imposts or Duties on Imports or Exports," "keep Troops or Ships of War in time of Peace," "enter into any Agreement or Compact ... with a foreign Power," or "engage in War, unless actually invaded." *Id.* § 10.

Because the Constitution mentions no general foreign affairs power, and because only a few specified powers

related to foreign affairs are expressly denied the states, one might assume that, with certain exceptions, states are free to pursue their own foreign policies. This is not, however, the case. To the contrary, the Supreme Court has long viewed the foreign affairs powers specified in the text of the Constitution as reflections of a generally applicable constitutional principle that power over foreign affairs is reserved to the federal government. The Court has sometimes expressed this principle in expansive terms, declaring, for example, that [HN3] "power over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink, 315 U.S. 203, 233, 86 L. Ed. 796, 62 S. Ct. 552 (1942); see also Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889)* (*The Chinese Exclusion Case*) ("For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.").

The implication of the general principle is that [HN4] "even in [the] absence of a treaty" or federal statute, a state may violate the constitution by "establishing its own foreign policy." *Zschernig v. Miller, 389 U.S. 429, 441, 19 L. Ed. 2d 683, 88 S. Ct. 664 (1968).* n6 *Zschernig* concerned an Oregon statute that provided for escheat of estate property claimed by a nonresident alien unless United States citizens had reciprocal rights in the country of the alien's residence and foreign heirs in that country would have the right to receive the proceeds of Oregon estates without confiscation. *Id. at 430-31.* The Court held that, while a reciprocity statute of this sort was not facially invalid, probate courts applying it impermissibly relied on inquiries into the type of governments that obtain in particular foreign nations -- whether aliens under their law have enforceable rights, whether the so-called "rights" are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in

good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation.

Id. at 434. In short, the Court found that the application of the statute depended less on an evaluation of the stated law of a particular country than on whether that country's political system was legitimate in the view of the Oregon courts. *See id. at 440* (noting that state courts had held that communist and fascist countries did not grant rights reciprocal to those of Oregonians). To condition the application of state law on the political system of a foreign country was "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Id. at 432.*

> n6 The doctrine has been referred to as "dormant foreign affairs preemption," or simply as "the foreign affairs power." *See Gerling Global Reinsurance Corp. of Am. v. Low, 240 F.3d 739, 751 n.9 (9th Cir. 2001)* (internal quotation marks removed), *cert. granted sub nom. Am. Ins. Ass'n v. Low, 71 U.S.L.W. 3373 (2003).*

Despite the broad language of *Pink* and the *Chinese Exclusion Case*, however, *Zschernig* is "the only case in which the Supreme Court has struck down a state statute as violative of the foreign affairs power." *Int'l Ass'n of Indep. Tanker Owners v. Locke, 148 F.3d 1053, 1069 (9th Cir. 1998), rev'd in part on other grounds sub nom. United States v. Locke, 529 U.S. 89, 146 L. Ed. 2d 69, 120 S. Ct. 1135 (2000). Zschernig* has been applied sparingly, because the Supreme Court has held that [HN5] a statute does not violate the constitution where it merely has "some incidental or indirect effect in foreign countries." *Clark v. Allen, 331 U.S. 503, 517, 91 L. Ed. 1633, 67 S. Ct. 1431 (1947)*

(upholding facially a statute similar to that subsequently struck as applied in *Zschernig*). n7

> n7 Other courts have, however, invalidated statutes under foreign affairs doctrine. *See, e.g., Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 49-61 (1st Cir. 1999)* (invalidating Massachusetts law restricting ability of Massachusetts and its agencies to purchase goods or services from individuals or companies engaged in business with Burma), *aff'd on other grounds sub nom. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 147 L. Ed. 2d 352, 120 S. Ct. 2288 (2000); Springfield Rare Coin Galleries, Inc. v. Johnson, 115 Ill. 2d 221, 236-37, 104 Ill. Dec. 743, 503 N.E.2d 300 (1986)* (invalidating state statute excluding South African coins from otherwise generally applicable state tax exemptions).

Noting that "the federal government's foreign affairs power .... is rarely invoked by the courts," we have declined to invalidate under *Zschernig* a California statute with certain superficial similarities to section 354.6. *Gerling Global Reinsurance Corp. of Am. v. Low, 240 F.3d 739, 752 (9th Cir. 2001), cert. granted sub nom. Am. Ins. Ass'n v. Low, 71 U.S.L.W. 3373 (2003). Gerling* concerned California's Holocaust Victim Insurance Relief Act, Cal. Ins. Code § § 13800-13807 ("HVIRA"), which requires insurers doing business in California to file certain information about any insurance policies that they or companies "related" to them sold in Europe and that were in effect between 1920 and 1945. *Id.*; *see Gerling, 240 F.3d at 743, 753.* While recognizing that HVIRA involved foreign affairs, we held that it was constitutional because of the combination of two factors: first, "HVIRA, on its face, involves commerce alone" -- and thus should be considered under the Supreme

Court's foreign commerce cases rather than under the foreign affairs cases; and second, HVIRA "is not, on its face, directed at any particular foreign country" -- and thus is comparatively unlikely to interfere with the foreign relations of the federal government. *Id. at 753.*

While *Gerling* shows that the general prohibition against state involvement with external affairs is not as broad as some judicial statements would imply, it also suggests a mode of analysis that is relevant to the cases before us. In particular, *Gerling* distinguishes among statutes according to the foreign affairs functions that they implicate. *Gerling* suggests that statutes that "mainly involve foreign commerce" are among those least likely to be held invalid under the foreign affairs power. *Id.* The regulation of commerce is simply not central to the foreign affairs power that is off limits to states. n8 For present purposes, we must consider the importance to foreign affairs analysis of another subset of foreign affairs powers: the power of the federal government to make and to resolve war, including the power to establish the procedure for resolving war claims.

> n8 State regulation of foreign commerce might, however, exceed constitutional limitations under other constitutional doctrines. *See, e.g., Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 328, 129 L. Ed. 2d 244, 114 S. Ct. 2268 (1994)* (considering whether state's international tax reporting system violated either dormant commerce clause or federal government's ability to speak in "one voice.")

While neither the Constitution nor the courts have defined the precise scope of the foreign relations power that is denied to the states, it is clear that matters concerning war are part of the inner core of this power. Of the eleven clauses of the Constitution granting foreign affairs powers to the

President and Congress, *see supra*, seven concern preparing for war, declaring war, waging war, or settling war. n9 Most of the Constitution's express limitations on states' foreign affairs powers also concern war. n10 Even those foreign affairs powers in the Constitution that do not expressly concern war and its resolution may be understood, in part, as a design to *prevent* war. Indeed, as the *Federalist* shows, supporters of the new Constitution believed that disunity in international affairs risked unnecessary war. *See, e.g.,* THE FEDERALIST, NO. 3, at 13 (Clinton Rossiter ed., 1961) ("Fewer just causes of war will be given by the national government, [and] it will also be more in their power to accommodate and settle them amicably."). The Supreme Court cases under the foreign affairs power have also been driven, in part, by this concern. Thus the inheritance provision at issue in *Zschernig*, although superficially unrelated to war, was seen by a Court operating at the height of the Cold War as a potential provocation to foreign powers. "'Experience has shown,'" the Court wrote in striking the provision, "'that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government.'" *389 U.S. at 441* (quoting *Hines v. Davidowitz, 312 U.S. 52, 64, 85 L. Ed. 581, 61 S. Ct. 399 (1941)).* [HN6] Matters related to war are for the federal government alone to address.

n9 *See* U.S. Const., art. II, § 2, cl. 1 (making President Commander in Chief); *id.* cl. 2; (authorizing President to make treaties with advice and consent of Senate); *id.* art. I, § 8, cl. 1 (authorizing Congress to "provide for the common Defence"); *id.* cl. 11 (authorizing Congress to declare war); *id.* cl. 12 (authorizing Congress to raise and support armies); *id.* cl. 13 (authorizing Congress to "provide and maintain

a Navy"); *id.* cl. 14 (authorizing Congress to regulate "the land and naval forces").

n10 *See id.* § 10 (prohibiting states from entering "any Treaty, Alliance, or Confederation," or, without congressional authorization, from "keeping Troops or Ships of War in time of Peace" and from "engaging in War, unless actually invaded.")

Among the six district court decisions we review here, the only one to reach the foreign affairs challenge to section 354.6 held that the provision was unconstitutional under that doctrine for six reasons:

(1) the terms of section 354.6 and its legislative history demonstrate a purpose to influence foreign affairs directly, (2) the statute targets particular countries, (3) the statute does not regulate an area that Congress has expressly delegated to states to regulate, (4) the statute establishes a judicial forum for negative commentary about the Japanese government and Japanese companies, (5) the Japanese government asserts that litigation of these claims could complicate and impede diplomatic relationships of the countries involved, and (6) the United States, through the State Department, contends that section 354.6 impermissibly intrudes upon the foreign affairs power of the federal government.

Forced Labor (Koreans), 164 F. Supp. 2d at 1173. Although we agree that section 354.6 violates the foreign affairs power, we base our holding on a narrower consideration. We hold that [HN7] section 354.6 is impermissible because it intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims.

With section 354.6, California seeks to redress wrongs committed in the course of the Second World War. By its terms, only "Second World War slave labor victims" and "Second World War forced labor victims" can bring suit under the provision. § 354.6(b). The wrong-doers under the statute -- the enslaving individuals or entities -- include "the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies or sympathizers." § 354.6(a)(1), (2). The governmental entities are, by definition, wartime enemies of the United States, while the "enterprises" identified in the provision, if not themselves our wartime enemies, were operating in enemy territory and presumably -- no party disputes this -- with the consent and for the benefit of our wartime enemy. Wrongs committed after the end of the war are not cognizable under section 354.6; the provision concerns only acts that took place during the years leading up to the war and during the years of the war itself. *Id.* In short, California has sought to create its own resolution to a major issue arising out of the war -- a remedy for wartime acts that California's legislature believed had never been fairly resolved.

The United States has already exercised its own exclusive authority to resolve the war, including claims arising out of it. It did not choose, however, to incorporate into that resolution a private right of action against our wartime enemies or their nationals. The United States resolved the war against Germany by becoming a party to a number of treaties and international agreements, beginning with the 1945 agreements at Yalta and Potsdam, in which the United States, Britain, and the Soviet Union agreed to extract reparations from Germany and its nationals but did not include a private right of action against either. *See* Protocol of the Proceedings, Berlin (Potsdam) Conference, Aug. 2, 1945, art. (B)(111), *3 Bevans 1207.* Subsequent agreements also failed to create a private right of action, including the Paris Reparations Treaty of 1946 between the United States

and 17 other nations, Agreement on Reparations From Germany, Jan. 14, 1946, 61 Stat. 3157, T.I.A.S. 1655 ("Paris Reparations Treaty"); the Transition Agreement of 1952 between the Western Powers and the Federal Republic of Germany, Convention Between the United Kingdom of Great Britain and Northern Ireland, France, the United States of America and the Federal Republic of Germany on the Settlement of Matters Arising Out of the War and the Occupation, May 26, 1952 (as amended by Schedule IV to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 23, 1954), *6 U.S.T. 4117,* 331 U.N.T.S. 219; the London Debt Agreement of 1953 between the United States and 20 other nations, Agreement on German External Debts, Feb. 27, 1953, *4 U.S.T. 443,* 333 U.N.T.S. 3; and the Two-Plus-Four Treaty, which reunified Germany and became effective on March 15, 1991, Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, *29 I.L.M. 1186.* n11 Most recently, the Foundation Agreement of July 17, 2000, an executive agreement between the governments of Germany and the United States, provided a limited form of remedy for claimants such as Deutsch. Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Concerning the Foundation "Remembrance, Responsibility and the Future." The Foundation was created by Germany, in negotiation with the United States, five Central and Eastern European countries, Israel, and the non-governmental Conference on Jewish Material Claims Against Germany, for the purpose of making payments to people who suffered at the hands of German companies during the Nazi Era. It provides for payment of up to 15,000 German Marks (roughly $ 7500) to individual claimants who were subjected to forced labor. *See id.* at Annex A. We do not have the authority to consider the adequacy of such payments here. Indeed, we acknowledge that no possible compensation

could be sufficient to remedy the harm done to Holocaust victims and their families.

n11 For useful and accessible surveys of these agreements as they apply to war reparations, see *Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 448-56 (D.N.J. 1999),* and *Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 265-73 (D.N.J. 1999).* The district court in *Deutsch* relied heavily on these cases and adopted their conclusion that Deutsch's claim raised a nonjusticiable political question, *Deutsch*, No. CV 00-4405, at 2-6, a conclusion with which we disagree. The district court determined that the postwar agreements created the exclusive remedy to the matters raised by Deutsch, and that to order relief would therefore require the court to interfere with the foreign affairs choices of the political branches. *Id.* [HN8] Under political question doctrine, the court noted, it is impermissible for a court to make policy related to foreign affairs. *Id.* at 2 (citing *Baker v. Carr, 369 U.S. 186, 211, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962)).* Therefore, the district court supposed, *Deutsch* raised a nonjusticiable political question. The problem with this argument is that it makes every dispute over the proper application of a treaty into a political question, because treaties inherently involve foreign affairs. [HN9] No political question, however, is raised by the simple application of the requirements of a treaty to which the United States is a party. Treaties have the force of law, *see Missouri v. Holland, 252 U.S. 416, 64 L. Ed. 641, 40 S. Ct. 382, 18 Ohio L. Rep. 61 (1920),* and, if they are self-executing or have been implemented through legislation, must be applied by the courts. *See United States v. Alvarez-Machain, 504 U.S. 655, 667, 119 L. Ed. 2d 441, 112 S. Ct. 2188 (1992).*

No party argues that any of these agreements provides the authority for a state of the United States to create a private right of action enabling individuals to recover for wartime injuries against German corporations. Deutsch argues, however, that the terms of these various agreements do not *prohibit* a state from creating such a right of action, and that in the absence of such a prohibition, his action may proceed. Deutsch's argument cannot carry the day. As we explained earlier, the Constitution allocates the power over foreign affairs to the federal government exclusively, and the power to make and resolve war, including the authority to resolve war claims, is central to the foreign affairs power in the constitutional design. In the absence of some specific action that constitutes authorization on the part of the federal government, states are prohibited from exercising foreign affairs powers, including modifying the federal government's resolution of war-related disputes.

The war with Japan ended with the Treaty of Peace, signed in San Francisco, on September 8, 1951, by the representatives of the United States and 47 other Allied powers and Japan, and ratified by the United States Senate on April 28, 1952. Treaty of Peace with Japan, Sept. 8, 1951, *3 U.S.T. 3169,* T.I.A.S. No. 2490. Although the parties dispute whether that treaty by its own terms precludes the claims brought by any of the Appellants, n12 that is the only dispute regarding the treaty. No party asserts that the treaty either creates -- explicitly or implicitly -- a private right of action against Japan or its nationals, or authorizes states of the United States to create such a right. n13 Once again, without such authorization, states lack the power to alter the federal government's resolution of disputes relating to the war. n14

n12 The central disagreement concerns the meaning of Article 14(b) of the treaty, which is quoted in full *supra* note 3. The district judge held that Appellants' claims were waived because they are claims of Allied nationals "arising out of actions taken by [Japanese] nationals in the course of the prosecution of the war." *Id.*; *Forced Labor (Allied I), 114 F. Supp. 2d at 944-49.* Appellants argue that the actions of the Appellee corporations were not taken "in the course of the prosecution of the war," or that it is an issue of fact whether they were or not. n13 Appellants do assert that, if Article 14 of the treaty waives claims against Japanese nationals, as Appellees assert, then Article 14 is superceded by Article 26. Article 26 provides, in pertinent part:

Should Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, the same advantages shall be extended to the parties to the present Treaty.

Treaty of Peace with Japan, at art. 26. Appellants argue that other foreign states have entered into agreements with Japan that do not waive private claims and that those agreements thereby extend to those foreign states "greater advantages" than the terms extended to the United States. The district court found that Article 26 confers rights only on the "parties" to the treaties, not on individuals. *Forced Labor (Allied I), 114 F. Supp. 2d at 949.* We agree, at least as to the right to invoke the clause. It is the prerogative of the United States, not of California or of Appellants, to determine whether a foreign state has been granted greater advantages and, if so, whether it is in the interest of the United States to incorporate those advantages (along with any concomitant lesser

disadvantages) into the treaty. The United States has not invoked Article 26 to authorize a private right of action. Appellants' reliance on the article is, therefore, unavailing. n14 It is immaterial that many of the Appellants are nationals of two nations, China and Korea, that were not signatories of the San Francisco treaty. When the United States has been a party to a war, the resolution it establishes to that war is the resolution for the whole of the United States. States lack the power to modify that resolution, regardless of the citizenship of those seeking redress.

The grievances of at least one class of potential plaintiffs identified in section 354.6, prisoners of war, were addressed by the federal government in domestic legislation. *See* § 354.6(a)(2). [HN10] Under the War Claims Act of 1948, *50 U.S.C. app. § § 2001*-2017p, assets seized from Germany, Japan, or their nationals within the United States and its territory were used to compensate American prisoners of war whose rights had been violated. *See* U.S. FOREIGN CLAIMS SETTLEMENT COMMISSION, SETTLEMENT OF CLAIMS BY THE FOREIGN CLAIMS SETTLEMENT COMMISSION FROM SEPTEMBER 14, 1949 TO MARCH 31, 1955, at 10-11 (1955); *50 U.S.C. app. § 2005*(d)(2)(A). The Act required prisoners of war to submit their claims to a federal agency, whose decision was final; it conceived of no private right of action against German or Japanese entities. *See 50 U.S.C. app. § 2010.*

California was dissatisfied with how the federal government chose to address the various wartime injuries suffered by victims of the Nazis and their allies after the United States brought the Second World War to a close. The California legislature found that, under the treaties and compensatory programs that the federal government had established, "victims of Nazi persecution have been deprived

of their entitlement to compensation for their labor and for injuries sustained while performing that labor as forced or slave laborers prior to and during the Second World War." 1999 Cal. Stat. 216, § 1(b) (codified in notes to Cal. Code Civ. Proc. § 354.6). The state legislature therefore enacted section 354.6 to remedy these 54-year-old injuries in a manner favored by California but not provided for by the federal government. Appellants assert that no international agreement or other federal action prohibits California from doing so. However, as we have stated, because the issue is the lack of state power, it is immaterial whether the federal government enacted a prohibition. The federal government, acting under its foreign affairs authority, provided its own resolution to the war; California has no power to modify that resolution. n15

n15 One might argue that the Holocaust was distinct from the German war effort, that claims for injuries arising from the Holocaust do not, therefore, relate to the war, and that such injuries, because they are unrelated to the war, do not implicate the war powers of the federal government. We need not assume that the acts of enslavement encompassed by section 354.6 served military purposes or advanced the war effort of the Nazis or their allies. We simply note that, by its terms, section 354.6 creates a right of action only for "Second World War" slave labor victims. For the purposes of the provision, the California legislature explicitly defined the harms suffered by such victims as pertaining to the war. Moreover, the federal government's exclusive power to resolve the war necessarily includes an exclusive power to address the injuries that section 354.6 attempts to remedy. The treaties themselves confirm that the federal government regarded all wartime injuries as matters integral to peacemaking, regardless

of the purpose or effect of the wrong-doer's acts. In the Paris Reparations Treaty, for example, the United States and the other signatories "agreed among themselves that their shares of reparation, as determined by the present Agreement, shall be regarded by each of them as covering all its claims and those of its nationals against the former German Government and its Agencies, of a governmental or private nature arising out of the war." Paris Reparations Treaty, Jan. 14, 1946, art. 2(A), 61 Stat. 3157, 3163; *see also, e.g.,* Treaty of Peace with Hungary, Feb. 10, 1947, art. 30(4), 61 Stat. 2109, 2126 (bilateral treaty between Allied Powers and Hungary) ("Hungary waives on its own behalf and on behalf of Hungarian nationals all claims against Germany and German nationals outstanding on May 8, 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before September 1, 1939.").

Before concluding our discussion of this issue, we must consider Appellants' most vigorous argument in favor of the constitutionality of section 354.6: that the provision "presents striking parallels" to HVIRA, the insurance reporting requirement that we upheld in *Gerling*. Appellants correctly note two points of similarity: first, like section 354.6, HVIRA is related to Nazi-era wrongs; second, as under section 354.6, at least as applied to the cases before us, the parties regulated by HVIRA are businesses. The similarity ends there, however. Unlike section 354.6, HVIRA does not attempt to require the affected businesses to compensate victims for past wrongs: Specifically, as we noted in *Gerling*, HVIRA does not impose obligations on "European insurance companies to pay or not to pay claims on European policies." *Gerling, 240 F.3d at 745* (internal

quotation marks removed). HVIRA, rather, is merely a reporting requirement and the only consequence of non-compliance is the inability to do business in California in the future. *Id.* Whereas section 354.6 seeks to provide a monetary remedy for decades-old wartime wrongs, HVIRA is a forward-looking regulatory statute. n16 In short, unlike section 354.6, HVIRA does not attempt to hold defendants liable for their past wartime conduct; it therefore does not implicate the exclusive power of the federal government to make and resolve war, including the resolution of claims arising out of such actions.

> n16 Appellants in *Gerling* originally challenged two other statutes that did attempt to force payment of Nazi-era insurance claims, *see* Cal. Code Civ. Proc. § 354.5; Cal. Ins. Code § 790.15, but those claims were dismissed for lack of standing and not addressed on appeal. *Gerling, 240 F.3d at 745; see also Gerling Global Reinsurance Corp. of Am. v. Low, 296 F.3d 832, 842 & n.7 (9th Cir. 2002), cert. granted sub nom. Am. Ins. Ass'n v. Low, 71 U.S.L.W. 3373 (2003).*

Because California lacks the power to create a right of action for war-related claims against our former enemies and those who operated in their territories, and section 354.6 runs afoul of the restriction on the exercise of foreign affairs powers by the states, we hold that [HN11] section 354.6 is unconstitutional.

III. Statutes of Limitations

In addition to section 354.6, Appellants bring various tort claims under common law, California statutory and constitutional law, as well as for violations of international

law under the Alien Tort Claims Act, *28 U.S.C. § 1350* ("ATCA"). *See supra*. All these claims are barred by their respective statutes of limitations.

Appellants apparently bring their common law claims under California law, although in many instances they do not identify the jurisdiction under whose law they seek relief. Some of the parties, including both defendants and plaintiffs, are California residents, while others are not; the alleged injuries all took place outside of California. [HN12] Regardless of the source of the substantive law, because all the claims, including both common law and statutory, were brought in California state court or in a district court within California, we apply to them the statute of limitations that would be applied in California state court. n17 [HN13] California applies the "governmental interest" approach to conflict of law issues. *Hurtado v. Superior Court, 11 Cal.3d 574, 579-80, 114 Cal. Rptr. 106, 522 P.2d 666 (1974).* Under this approach, the correct choice of law depends on "an analysis of the respective interests of the states involved." *Id. at 579.* Where the conflict concerns a statute of limitations, the governmental interest approach generally leads California courts to apply California law. Witkin, 3 CALIFORNIA PROCEDURE § 104 (4th ed. 1996); *see, e.g., Peterson v. Kennedy, 771 F.2d 1244, 1251 n.4 (9th Cir. 1985); American Bank of Commerce v. Corondoni, 169 Cal. App. 3d 368, 215 Cal. Rptr. 331 (Ca. Ct. App. 1985),* and especially so where California's statute would bar a claim. California's interest in applying its own law is strongest when its statute of limitations is shorter than that of the foreign state, because a "state has a substantial interest in preventing the prosecution in its courts of claims which it deems to be 'stale.' Hence, subject to rare exceptions, the forum will dismiss a claim that is barred by its statute of limitations." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142, cmt. f (1988).

n17 The district court addressing the claims brought by Korean and Chinese Appellants found that the non-federal claims would be time-barred under Chinese and Japanese law, as well as under the law of California. *Forced Labor (Koreans), 164 F. Supp. 2d at 1182.*

All the claims in the cases before us, other than those under the ATCA, have been stale for several decades under the applicable California statutes of limitations. *See* Cal. Code Civ. Proc. § 340 (one-year statute for personal injury torts, wrongful death and false imprisonment); *id.* § 338 (three-year statute for taking of or injury to personal property, and for fraud); Cal. Bus. & Prof. Code § 17208 (four-year statute for claims of unfair business practices). Only an extraordinarily strong interest of a foreign state in keeping these claims alive could overcome the presumption that California will not hear claims that have been stale for so long under its own law. No such strong foreign interest has been demonstrated here.

[HN14] The statute of limitations under the ATCA is 10 years. *Doe v. Unocal Corp.*, ___ F.3d ___, *2002 U.S. App. LEXIS 19263,* at *27 (9th Cir. 2002). n18 Appellants have thus brought these claims far too late as well. n19

n18 The 10-year limit is not stated in the provision. Rather, we adopted it from the Torture Victim Protection Act, *see* Pub.L. No. 102-256, 106 Stat. 73 (1992) (codified at *28 U.S.C. § 1350,* statutory notes) ("TVPA"), which has an explicit 10-year statute. *Papa v. United States, 281 F.3d 1004, 1011-13 (9th Cir. 2002).* We did so because [HN15] where a federal statute lacks a specified statute of limitations,

courts apply the limitations period provided by the jurisdiction in which they sit unless "a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking."

Papa, 281 F.3d at 1011-12 (citing *North Star Steel Co. v. Thomas, 515 U.S. 29, 35, 132 L. Ed. 2d 27, 115 S. Ct. 1927 (1995)).* We held that ATCA was closely analogous to the TVPA both in its purpose and in its mechanism for achieving that purpose. *Papa, 281 F.3d at 1012.* Appellants ask us to reconsider our decision in *Papa*, at least as it applies to the present cases, and hold that the ATCA is more closely analogous to section 354.6 than to the TVPA. The result, Appellants argue, would be that the claims are not barred until 2010. For the reasons we stated in *Papa*, and because we hold that section 354.6 is unconstitutional, we reaffirm that the ATCA statute of limitations in this case, as in other cases, is 10 years.

n19 Some Appellants who did not bring a claim under the ATCA argue that they should be permitted to amend their complaints to do so. In light of our holding, such an amendment would be futile.

Some Appellants contend, however, that their claims under both state law and the ATCA are equitably tolled and could therefore survive our invalidation of section 354.6. Although the district court found that they did not allege facts sufficient to trigger equitable tolling, these Appellants contend that they were not required to allege such facts, because a statute of limitations is an affirmative defense, which a plaintiff is not required to anticipate in the

complaint. They also contend that even if they were required to allege such facts, the district court should have granted them leave to amend in order to give them the opportunity to do so. The curious aspect of this argument is that all of the Appellants who make this argument *did* plead equitable tolling in their complaints. Furthermore, they alleged *facts* that they believed would trigger such tolling. They alleged, for example, that the defendants had kept the plaintiffs ignorant of essential facts in the defendants' possession. The district court considered these alleged facts and found them insufficient to trigger tolling. *Forced Labor (Koreans), 164 F. Supp. 2d at 1181-82.* Although the court's discussion of equitable tolling concerned only the ATCA, its reasoning applies equally to the state law claims. On appeal, these Appellants offer neither a satisfactory answer to the district court's finding regarding equitable tolling nor any hint of any additional facts that they might allege in an amended complaint. Under these circumstances, amendment would be futile. We therefore find no abuse of discretion in the district court's dismissal of the complaints with prejudice. n20

n20 Deutsch argues for the first time on appeal that he should be permitted to amend his complaint to include a claim under the TVPA. He offers no explanation, however, for why he failed to bring that claim in his first amended complaint. Moreover, as noted above, the TVPA has an explicit statute of limitation of 10 years. Deutsch argues that that period commenced on the effective date of the Act, rather than on the date on which the injury was complete. He cites no authority for this proposition, and we do not find it to be a reasonable or plausible one. As Deutsch notes, we have held that the TVPA is applicable to acts that took place prior to the effective date of the Act. *Alvarez-Machain v. United States, 107 F.3d 696, 702-03 (9th Cir. 1996).* In *Alvarez-Machain*, however, the

plaintiff filed his claim only three years after the date of the alleged injury. *Id. at 700.* Nothing in our cases or the statute suggests that Congress intended the TVPA to open the federal courts to claims that were already more than 40 years old when the statute became effective or that no time limit exists under the TVPA as to the resurrection of claims for damages that may have occurred in the far distant past. Because the TVPA has a 10-year statute of limitations, permitting Deutsch to amend his complaint would be futile. We therefore affirm the dismissal with prejudice.

IV. Jurisdiction

In many of the cases before us, there is indisputable federal jurisdiction. In some, for example in *Deutsch* and in *Dunn v. Nippon Steel Corp.,* n21 there is diversity jurisdiction. *28 U.S.C. § 1332.* Appellants in several other cases, for example in *Terrence v. Mitsui & Co., Wheeler v. Mitsui & Co.,* and *Kim v. Ishikawajima Harima Heavy Indus. Co.*, assert claims under international law, thus giving rise to federal subject matter jurisdiction under *28 U.S.C. § 1331.*

n21 In *Dunn*, the amount in controversy is not stated in the complaint, nor was the amount determined by the district court. However, the Appellant seeks compensation and punitive damages for roughly three years of withheld wages, as well as for severe physical and mental injuries he suffered at the hands of the defendants and their predecessors during that time. There is thus no doubt that this case meets the $ 75,000 minimum amount in controversy required for diversity jurisdiction under *28 U.S.C. § 1332.*

Among the many cases that have been consolidated, there are some individual cases as to which federal jurisdiction may be uncertain. Appellants in those cases originally sought relief in state court, under state law, n22 against non-diverse defendants. After removal and consolidation, some of the Appellants sought remand to state court. The district court denied their motions, *Forced Labor (Allied I), 114 F. Supp. 2d at 943,* on the ground that "the complaints ..., on their face, implicate the federal common law of foreign relations." *Id.* Appellees opposed remand on other grounds as well. Appellants in some of these cases -- not precisely the same group that moved for remand below -- now argue that federal jurisdiction is lacking.

> n22 Although some plaintiffs amended or sought to amend their complaints, after removal, to include federal claims, such amendments do not bear on the evaluation of removal jurisdiction. *Abada v. Charles Schwab & Co., 300 F.3d 1112, 1117 (9th Cir. 2002).*

Normally, of course, we would address all jurisdictional issues as an initial matter, as they would determine whether we could proceed to the merits. The situation is different with respect to the cases consolidated here, because the cases over which jurisdiction is disputed raise no merits issues that are not also raised by one or more cases over which jurisdiction is certain and which have been consolidated with the disputed cases. In short, we are compelled to address all of the merits issues in these consolidated cases, regardless of whether there is jurisdiction over each of them. Furthermore, the ultimate survival of all of these cases depends on the validity of the provisions of section 354.6. In light of our holding that section 354.6 is unconstitutional, remand to state court of the cases of uncertain federal jurisdiction would be futile, as the state court would simply dismiss the

claims with prejudice. *See Bates v. Jones, 127 F.3d 870, 873 (9th Cir. 1997)* (noting that the California Supreme Court "has yet to disregard a directly applicable decision of this court on a question of federal law"). Therefore, our determination of the uncertain jurisdictional issues could have no effect on the outcome of any of the cases.

For these reasons, we decline to address the uncertain jurisdictional issues and simply affirm the district court's dismissal of all the cases before us.

Conclusion

For the foregoing reasons, we hold that [HN16] California Code of Civil Procedure section 354.6 is an unconstitutional intrusion on the foreign affairs power of the United States and that Appellants' remaining claims are barred by the applicable statutes of limitations. The judgments of the district courts are

AFFIRMED.

IN RE: WORLD WAR II ERA JAPANESE FORCED LABOR LITIGATION, This Document Relates To: Alfano v Mitsubishi Corp, CD Cal No 00-3174; Corre v Mitsui & Co, CD Cal No 00-999; Eneriz v Mitsui & Co, CD Cal No 00-1455; Heimbuch, et al. v Ishihara Sangyo Kaisha, Ltd, ND Cal No 00-0064; Hutchison v Mitsubishi Materials Corp, CD Cal No 00-2796; King v Nippon Steel Corp, ND Cal No 99-5042; Levenberg v Nippon Sharyo, Ltd, ND Cal No 99-1554; Levenberg v Nippon Sharyo, Ltd, ND Cal No 99-4737; Poole v Nippon Steel Corp, CD Cal No 00-0189; Price v Mitsubishi Corp., CD Cal No 00-5484; Solis v Nippon Steel Corp., CD Cal No 00-0188; Titherington v Japan Energy Corp, CD Cal No 00-4383; Wheeler v Mitsui & Co, Ltd, CD Cal No 00-2057

Master File No MDL-1347, CD Cal No 00-3174, CD Cal No 00-999, CD Cal No 00-1455, ND Cal No 00-0064, CD Cal No 00-2796, ND Cal No 99-5042, ND Cal No 99-1554, ND Cal No 99-4737, CD Cal No 00-0189, CD Cal No 00-5484, CD Cal No 00-0188, CD Cal No 00-4383, CD Cal No 00-2057

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

114 F. Supp. 2d 939; 2000 U.S. Dist. LEXIS 13984

September 21, 2000, Filed

DISPOSITION: Motions to dismiss and/or for judgment on the pleadings GRANTED.

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JUDGES: VAUGHN R WALKER, United States District Judge.

OPINIONBY: VAUGHN R WALKER

OPINION: ORDER NO 4

On December 23, 1941, after mounting a brave resistance against an overwhelming foe, the small American garrison on Wake Island in the South Pacific surrendered to Imperial Japanese forces. James King, a former United States Marine, was among the troops and civilians taken prisoner by the invaders. He was ultimately shipped to Kyushu, Japan, where he spent the remainder of the war toiling by day as a slave laborer in a steel factory and enduring maltreatment in a prison camp by night. When captured, King was 20 years old, 5 feet 11 inches tall and weighed 167 pounds. At the conclusion of the war, he weighed 98 pounds.

James King is one of the plaintiffs in these actions against Japanese corporations for forced labor in World War II; his experience, and the undisputed injustice he suffered, are representative. King and the other plaintiffs seek judicial redress for this injustice.

I

These actions are before the court for consolidated pretrial proceedings pursuant to June 5, 2000, and June 15, 2000, orders of transfer by the Judicial Panel on Multidistrict Litigation. On August 17, 2000, the court heard oral argument on plaintiffs' motions for remand to state court and defendants' motions to dismiss or for judgment on the pleadings.

This order addresses, first, all pending motions for remand. For the reasons stated below, the court concludes that notwithstanding plaintiffs' attempts to plead only state law claims, removal jurisdiction exists because these actions

raise substantial questions of federal law by implicating the federal common law of foreign relations.

Second, the court addresses the preclusive effect of the 1951 Treaty of Peace with Japan on a subset of the actions before the court, namely, those brought by plaintiffs who were United States or allied soldiers in World War II captured by Japanese forces and held as prisoners of war. The court concludes that the 1951 treaty constitutes a waiver of such claims.

This order does not address the pending motions to dismiss in cases brought by plaintiffs who were not members of the armed forces of the United States or its allies. Since these plaintiffs are not citizens of countries that are signatories of the 1951 treaty, their claims raise a host of issues not presented by the Allied POW cases and, therefore, require further consideration in further proceedings.

II

[HN1]Defendants may remove to federal court "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 USC § 1441(a). "The propriety of removal thus depends on whether the case originally could have been filed in federal court." Chicago v International College of Surgeons, 522 U.S. 156, 163, 139 L. Ed. 2d 525, 118 S. Ct. 523 (1997).

[HN2]Federal courts have original jurisdiction over cases "arising under the Constitution, laws or treaties of the United States." 28 USC § 1331. [HN3]For purposes of removal, federal question jurisdiction exists "only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar Inc v Williams, 482 U.S. 386, 392, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987). Since a defense is not part of a plaintiff's properly pleaded statement of his claim, a case may not be removed to federal court on the basis of a federal defense. Rivet v Regions Bank of La, 522 U.S. 470, 475, 139 L. Ed. 2d 912, 118 S. Ct. 921 (1998).

Defendants' assertion of the Treaty of Peace with Japan as a defense to plaintiffs' state law causes of action does not, therefore, confer federal jurisdiction. Recognizing this, defendants rely on a line of cases committing to federal

common law questions implicating the foreign relations of the United States.

In Banco Nacional de Cuba v Sabbatino, 376 U.S. 398, 425, 11 L. Ed. 2d 804, 84 S. Ct. 923 (1964), a case in which federal jurisdiction was based on diversity of citizenship, [HN4]the Supreme Court held that development and application of the act of state doctrine was a matter of federal common law, notwithstanding the general rule of Erie R Co v Tompkins, 304 U.S. 64, 78, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), that federal courts apply state substantive law in diversity cases. The court reasoned that because the doctrine concerned matters of comity between nations, "the problems involved are uniquely federal in nature." 376 U.S. at 424. lthough the applicable state law mirrored federal decisions, the Court was "constrained to make it clear that an issue [involving] our relationships with other members of the international community must be treated exclusively as an aspect of federal law." Id at 425.

Under Banco Nacional, [HN5]federal common law governs matters concerning the foreign relations of the United States. See Texas Indus, Inc v Radcliff Materials, Inc, 451 U.S. 630, 641, 68 L. Ed. 2d 500, 101 S. Ct. 2061 (1981). "In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the * * * international nature of the controversy makes it inappropriate for state law to control." Id.

[HN6]If an examination of the complaint shows that the plaintiff's claims necessarily require determinations that will directly and significantly affect United States foreign relations, a plaintiff's state law claims should be removed. Republic of Philippines v Marcos, 806 F.2d 344, 352 (2d Cir 1986). This doctrine has been extended to disputes between private parties that implicate the "vital economic and sovereign interests" of the nation where the parties' dispute arose. Torres v Southern Peru Copper Corp, 113 F.3d 540, 543 n8 (5th Cir 1997).

The court concludes that the complaints in the instant cases, on their face, implicate the federal common law of foreign relations and, as such, give rise to federal jurisdiction.

Plaintiffs' claims arise out of world war and are enmeshed with the momentous policy choices that arose in the war's aftermath. The cases implicate the uniquely federal interests of the United States to make peace and enter treaties with foreign nations. As the United States has argued as amicus curiae, these cases carry potential to unsettle half a century of diplomacy.

After a thorough analysis, Judge Baird in the Central District of California denied remand in one of the cases now before the undersigned pursuant to the multidistrict litigation transfer order. Poole v Nippon Steel Corp, No 00-0189 (CD Cal March 17, 2000). The court agrees with the analysis and the conclusion in that case.[1] Judge Baird held: "This case, on its face, presents substantial issues of federal common law dealing with foreign policy and relations. * * * As such, plaintiffs may not evade this Court's jurisdiction by cloaking their complaints in terms of state law." The motions for remand are DENIED.

III

In addressing the motions to dismiss, the court refers again to a complaint that is representative of the actions by United States and Allied POWs, King v Nippon Steel Corp., No 99-5042.

As noted at the outset of this order, plaintiff King seeks redress for wrongs inflicted by his captors half a century ago. In count one of the complaint, he asserts a claim under [HN7]California Code of Civil Procedure § 354.6, a new law that permits an action by a "prisoner-of-war of the Nazi regime, its allies or sympathizers" to "recover compensation for labor performed as a Second World War slave labor victim * * * from any entity or successor in interest thereof, for whom that labor was performed * * * ." Cal Code Civ

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[1] In another related case in which remand was granted, Jeong Onoda Cement Co, Ltd, 2000 U.S. Dist. LEXIS 7985 (CD Cal May 18, 2000) the court did not consider the federal common law of foreign relation as a basis for federal jurisdiction.

Pro § 354.6. Count two is an unjust enrichment claim in which plaintiff seeks disgorgement and restitution of economic benefits derived from his labor. In count three, plaintiff seeks damages in tort for battery, intentional infliction of emotional distress and unlawful imprisonment. Count four alleges that defendant's failure to reveal its prior exploitation of prisoner labor to present-day customers in California and elsewhere constitutes an unfair business practice under California Business and Professions Code § 17204.

Defendants move pursuant to Federal Rule of Civil Procedure 12(c) for a judgment on the pleadings, arguing: (1) plaintiff's claims are barred by the Treaty of Peace with Japan; (2) plaintiff's claims raise nonjusticiable political questions; (3) the peace treaty, the War Claims Act of 1948 and the federal government's plenary authority over foreign affairs combine to preempt plaintiff's claims and (4) because the complaint alleges injuries caused by the Japanese government, plaintiff's claims are barred by the act of state doctrine and the Foreign Sovereign Immunities Act.

These arguments, and King's countervailing positions, arise in all of the cases before the court brought on behalf of Allied POWs against Japanese corporations. The court need not address all of them. For the reasons stated below, the court concludes that plaintiffs' claims are barred by the Treaty of Peace with Japan.

A

[HN8]A motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) is the proper means to challenge the sufficiency of the complaint after an answer has been filed. Depending on the procedural posture of the individual case, some defendants have filed motions pursuant to FRCP 12(c) and others have filed motions to dismiss pursuant to FRCP 12(b). The distinction in the present context is not important. [HN9]In the Ninth Circuit, the standard by which the district court must determine Rule 12(c) motions is the same as the standard for the more familiar motion to dismiss under Rule 12(b)(6): "A district court will render a judgment on the pleadings when the moving party clearly establishes on the face of the pleadings [and by evidence of which the court takes judicial notice]

that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." Enron Oil Trading & Transp Co v Walbrook Ins Co, 132 F.3d 526, 529 (9th Cir 1997) (citations omitted).

B

[HN10]The Treaty of Peace with Japan was signed at San Francisco on September 8, 1951, by the representatives of the United States and 47 other Allied powers and Japan. Treaty of Peace with Japan, [1952] 3 UST 3169, TIAS No 2490 (1951). President Truman, with the advice and consent of the Senate, ratified the treaty and it became effective April 28, 1952. Id.

Article 14 provides the terms of Japanese payment "for the damage and suffering caused by it during the war." Id at Art 14(a). For present purposes, the salient features of the agreement are: (1) a grant of authority of Allied powers to seize Japanese property within their jurisdiction at the time of the treaty's effective date; (2) an obligation of Japan to assist in the rebuilding of territory occupied by Japanese forces during the war and (3) waiver of all "other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war * * * ." Id at Art 14(a)-(b) (emphasis added).

It is the waiver provision that defendants argue bars plaintiffs' present claims. In its entirety, the provision reads:

> ([HN11]b) Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims if the Allied Powers for direct military costs of occupation.

Id at Art 14(b).

[HN12]On its face, the treaty waives "all" reparations and "other claims" of the "nationals" of Allied powers "arising out of any actions taken by Japan and its nationals during the

course of the prosecution of the war." The language of this waiver is strikingly broad, and contains no conditional language or limitations, save for the opening clause referring to the provisions of the treaty. [HN13]The interests of Allied prisoners of war are addressed in Article 16, which provides for transfer of Japanese assets in neutral or enemy jurisdictions to the International Committee of the Red Cross for distribution to former prisoners and their families. Id at Art 16. The treaty specifically exempts from reparations, furthermore, those Japanese assets resulting from "the resumption of trade and financial relations subsequent to September 2, 1945." Id at Art 14(a)(2)(II)(iv).

To avoid the preclusive effect of the treaty, plaintiffs advance an interpretation of Article 14(b) that is strained and, ultimately, unconvincing. Although the argument has several shades, it comes down to this: the signatories of the treaty did not understand the Allied waiver to apply to prisoner of war claims because the provision did not expressly identify such claims, in contrast to the corresponding Japanese waiver provision of Article 19. Article 19(b) states that the Japanese waiver includes "any claims and debts arising in respect to Japanese prisoners of war and civilian internees in the hands of the Allied Powers * * * ."

That the treaty is more specific in Article 19 does not change the plain meaning of the language of Article 14. If the language of Article 14 were ambiguous, plaintiffs' expressio unius argument would have more force. But plaintiffs cannot identify any ambiguity in the language of Article 14. To do so would be to inject hidden meaning into straightforward text.

[HN14]The treaty by its terms adopts a comprehensive and exclusive settlement plan for war-related economic injuries which, in its wholesale waiver of prospective claims, is not unique. See, for example, Neri v United States, 204 F.2d 867 (2d Cir 1953) (claim barred by broad waiver provision in Treaty of Peace with Italy). The waiver provision of Article 14(b) is plainly broad enough to encompass the plaintiffs' claims in the present litigation.

C

[HN15]The court does not find the treaty language ambiguous, and therefore its analysis need go no further. Chan v Korean Airlines, 490 U.S. 122, 134, 104 L. Ed. 2d 113, 109 S. Ct. 1676 (1989) (if text of treaty is clear, courts "have no power to insert an amendment."). To the extent that Articles 19(b) raises any uncertainty, however, the court "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." Air France v Saks, 470 U.S. 392, 396, 84 L. Ed. 2d 289, 105 S. Ct. 1338 (1985). These authorities are voluminous and therefore of doubtful utility due to the potential for misleading selective citation. Counsel for both sides have proved themselves skilled in scouring these documents for support of their positions, and that both sides have succeeded to a certain degree underscores the questionable value of such resort to drafting history. Nevertheless, the court has conducted its own review of the historical materials, and concludes that they reinforce the conclusion that the Treaty of Peace with Japan was intended to bar claims such as those advanced by plaintiffs in this litigation.

The official record of treaty negotiations establishes that a fundamental goal of the agreement was to settle the reparations issue once and for all. As the statement of the chief United States negotiator, John Foster Dulles, makes clear, it was well understood that leaving open the possibility of future claims would be an unacceptable impediment to a lasting peace:

> Reparation is usually the most controversial aspect of peacemaking. The present peace is no exception.
>
> On the one hand, there are claims both vast and just. Japan's aggression caused tremendous cost, losses and suffering. * * *
>
> On the other hand, to meet these claims, there stands a Japan presently reduced to four home islands which are unable to produce the food its people need to live, or the raw materials they need to work. * * *

> Under these circumstances, if the treaty validated, or kept contingently alive, monetary reparations claims against Japan, her ordinary commercial credit would vanish, the incentive of her people would be destroyed and they would sink into a misery of body and spirit that would make them easy prey to exploitation. * * *
>
> There would be bitter competition [among the Allies] for the largest possible percentage of an illusory pot of gold.

See US Dept of State, Record of Proceedings of the Conference for the Conclusion and Signature of the Treaty of Peace with Japan 82-83 (1951) (Def Req for Judicial Notice, Exh I).

The policy of the United States that Japanese liability for reparations should be sharply limited was informed by the experience of six years of United States-led occupation of Japan. During the occupation the Supreme Commander of the Allied Powers (SCAP) for the region, General Douglas MacArthur, confiscated Japanese assets in conjunction with the task of managing the economic affairs of the vanquished nation and with a view to reparations payments. See SCAP, Reparations: Development of Policy and Directives (1947). It soon became clear that Japan's financial condition would render any aggressive reparations plan an exercise in futility. Meanwhile, the importance of a stable, democratic Japan as a bulwark to communism in the region increased. At the end of 1948, MacArthur expressed the view that "the use of reparations as a weapon to retard the reconstruction of a viable economy in Japan should be combated with all possible means" and "recommended that the reparations issue be settled finally and without delay." Memorandum from General Headquarters of SCAP to Department of the Army (Dec. 14, 1948) at P 8 (Def Req for Judicial Notice, Exh E).

That this policy was embodied in the treaty is clear not only from the negotiations history but also from the Senate Foreign Relations Committee report recommending approval of the treaty by the Senate. The committee noted, for example:

> Obviously insistence upon the payment of reparations in any proportion commensurate with the claims of the injured countries and their nationals would wreck Japan's economy, dissipate any credit that it may possess at present, destroy the initiative of its people, and create misery and chaos in which the seeds of discontent and communism would flourish. In short, [it] would be contrary to the basic purposes and policy of * * * the United States * * * .

Japanese Peace Treaty and Other Treaties Relating to Security in the Pacific, S Rep No 82-2, 82d Cong, 2d Sess 12 (1952) (Def Req for Judicial Notice, Exh F). The committee recognized that the treaty provisions "do not give a direct right of return to individual claimants except in the case of those having property in Japan," id at 13, and endorsed the position of the State Department that "United States nationals, whose claims are not covered by the treaty provisions * * * must look for relief to the Congress of the United States," id at 14.

Indeed, the treaty went into effect against the backdrop of congressional response to the need for compensation for former prisoners of war, in which many, if not all, of the plaintiffs in the present cases participated. See War Claims Act of 1948, 50 USC §§ 2001-2017p (establishing War Claims Commission and assigning top priority to claims of former prisoners of war).

Were the text of the treaty to leave any doubt that it waived claims such as those advanced by plaintiffs in these cases, the history of the Allied experience in post-war Japan, the drafting history of the treaty and the ratification debate would resolve it in favor of a finding of waiver.

D

As one might expect, considering the acknowledged inadequacy of compensation for victims of the Japanese regime provided under the treaty, the issue of additional reparations has arisen repeatedly since the adoption of that agreement some 50 years ago. This is all the more

understandable in light of the vigor with which the Japanese economy has rebounded from the abyss.

The court finds it significant, as further support for the conclusion that the treaty bars plaintiffs' claims, that the United States, through State Department officials, has stood firmly by the principle of finality embodied in the treaty. This position was expressed in recent congressional testimony by Ronald J Bettauer, deputy legal advisor, as follows:

> The 1951 Treaty of Peace with Japan settles all war-related claims of the U.S. and its nationals, and precludes the possibility of taking legal action in United States domestic courts to obtain additional compensation for war victims from Japan or its nationals--including Japanese commercial enterprises.

POW Survivors of the Bataan Death March, Hearing before the Senate Committee on the Judiciary (June 28, 2000) (statement of Ronald J Bettauer, United States Department of State) (Def Req for Judicial Notice, Exh P).

In another recent example, in response to a letter from Senator Orrin Hatch expressing "disappointment" with the "fifty-five year old injustice imposed on our military forces held as prisoners of war in Japan" and urging the Secretary of State to take action, a State Department representative wrote:

> The Treaty of Peace with Japan has, over the past five decades, served to sustain U.S. security interests in Asia and to support peace and stability in the region. We strongly believe that the U.S. must honor its international agreements, including the [treaty]. There is, in our view, no justification for the U.S. to attempt to reopen the question of international commitments and obligations under the 1951 Treaty in order now to seek a more favorable settlement of the issue of Japanese compensation.

> This explanation obviously offers no consolation to the victims of Japanese wartime aggression. Regrettably, however, it was impossible when the Treaty was negotiated--and it remains impossible today, 50 years later--to compensate fully for the suffering visited upon the victims of the war * * * .

Letter of Jan 18, 2000, from US Dept of State to The Hon Orrin Hatch at 2.

[HN16]The conclusion that the 1951 treaty constitutes a waiver of the instant claims, as stated above and argued in the brief of the United States as amicus curiae in this case, carries significant weight. See Kolovrat v Oregon, 366 U.S. 187, 194, 6 L. Ed. 2d 218, 81 S. Ct. 922 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."); Sullivan v Kidd, 254 U.S. 433, 442, 41 S. Ct. 158, 65 L. Ed. 344 (1921) ("The construction placed upon the treaty before us and consistently adhered to by the Executive Department of the Government, charged with the supervision of our foreign relations, should be given much weight."). The government's position also comports entirely with the court's own analysis of the treaty and its history.

Plaintiffs raise several additional arguments that bear only brief mention. First is the characterization of these claims as not arising out of the "prosecution of the war," as that phrase is used in the treaty. Plaintiffs attempt to cast their claims as involving controversies between private parties.

It is particularly far-fetched to attempt to distinguish between the conduct of Imperial Japan during the Second World War and the major industry that was the engine of its war machine. The lack of any sustainable distinction is apparent from the complaints in these cases. For example, the King complaint alleges that a class of war prisoners were forced to work "in support of the Japanese war effort," Compl P 56, and pursuant to a directive from the Japanese government that the "'labor and technical skill'" of prisoners of war "'be fully utilized for the replenishment of production, and contribution rendered toward the prosecution of the Greater East Asiatic War,'" id at P 30. Furthermore, the complaint

asserts that plaintiff worked in a factory "where motor armatures were manufactured for the war effort." Id at P 35. These allegations quite clearly bring this action within the scope of the treaty's waiver of all claims "arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." Treaty at Art 14(b).

Plaintiffs also argue that waiver of plaintiffs' claims renders the treaty unconstitutional and invalid under international law. This position is contrary to the well-settled principle that the government may lawfully exercise its "sovereign authority to settle the claims of its nationals against foreign countries." Dames & Moore v Regan, 453 U.S. 654, 679-80, 69 L. Ed. 2d 918, 101 S. Ct. 2972 (1981); see also Neri, 204 F.2d at 868-69 (enforcing treaty waiver of reparations claims).

Finally, plaintiffs assert that subsequent settlements between Japan and other treaty signatories on more favorable terms than those set forth in the treaty should "revive" plaintiff's claims under Article 26, which provides in relevant part:

> [HN17]
> Should Japan make a * * * war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty.

Treaty at Art 26. [HN18]Without deciding whether the evidence plaintiff cites of other agreements implicates Article 26, the court finds that that provision confers rights only upon the "parties to the present treaty," i.e., the government signatories. The question of enforcing Article 26 is thus for the United States, not the plaintiffs, to decide.

IV

The Treaty of Peace with Japan, insofar as it barred future claims such as those asserted by plaintiffs in these actions, exchanged full compensation of plaintiffs for a future peace. History has vindicated the wisdom of that bargain. And while full compensation for plaintiffs' hardships, in the purely economic sense, has been denied these former prisoners and countless other survivors of the war, the immeasurable bounty of life for themselves and their

posterity in a free society and in a more peaceful world services the debt.

The motions to dismiss and/or for judgment on the pleadings are GRANTED. The clerk shall enter judgment in favor of defendants in the above-captioned cases.

IT IS SO ORDERED.

VAUGHN R WALKER

United States District Judge

MULTILATERAL

TREATY OF PEACE WITH JAPAN

TIAS 2490

3 U.S.T. 3169; 1951 U.S.T. LEXIS 516

September 8, 1951, Date-Signed

April 28, 1952, Date-In-Force

STATUS:
Signed at San Francisco September 8, 1951; ratification advised by the Senate of the United States of America March 20, 1952, with a declaration; ratified by the President of the United States of America April 15, 1952, subject to declaration; ratification of the United States of America deposited at Washington April 28, 1952; proclaimed by the President of the United States of America April 28, 1952; entered into force April 28, 1952. With declarations by Japan signed at San Francisco September 8, 1951. And exchange of notes signed at San Francisco September 8, 1951.

TREATY OF PEACE WITH JAPAN

TEXT:
BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS the Treaty of Peace with Japan was signed at San Francisco on September 8, 1951 by the respective

Plenipotentiaries of the United States of America and 47 other Allied Powers, and Japan;

WHEREAS the text of the said Treaty, in the English, French, Spanish, and Japanese languages, is word for word as follows:

Whereas the Allied Powers and Japan are resolved that henceforth their relations shall be those of nations which, as sovereign equals, cooperate in friendly association to promote their common welfare and to maintain international peace and security, and are therefore desirous of concluding a Treaty of Peace which will settle questions still outstanding as a result of the existence of a state of war between them;

Whereas Japan for its part declares its intention to apply for membership in the United Nations and in all circumstances to conform to the principles of the Charter of the United Nations; to strive to realize the objectives of the Universal Declaration of Human Rights;[1] to seek to create within Japan conditions of stability and well-being as defined in Articles 55 and 56 of the Charter of the United Nations and already initiated by post-surrender Japanese legislation; and in public and private trade and commerce to conform to internationally accepted fair practices;

Whereas the Allied Powers welcome the intentions of Japan set out in the foregoing paragraph;

The Allied Powers and Japan have therefore determined to conclude the present Treaty of Peace, and have accordingly appointed the undersigned Plenipotentiaries, who, after presentation of their full powers, found in good and due form, have agreed on the following provisions:

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[1] Senate doc. 123, 81st Cong., 1st sess., p. 1156.

CHAPTER I

PEACE

Article 1

(a) The state of war between Japan and each of the Allied Powers is terminated as from the date on which the present Treaty comes into force between Japan and the Allied Power concerned as provided for in Article 23.

(b) The Allied Powers recognize the full sovereignty of the Japanese people over Japan and its territorial waters.

CHAPTER II

TERRITORY

Article 2

(a) Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet.

(b) Japan renounces all right, title and claim to Formosa and the Pescadores.

(c) Japan renounces all right, title and claim to the Kurile Islands, and to that portion of Sakhalin and the islands adjacent to it over which Japan acquired sovereignty as a consequence of the Treaty of Portsmouth of September 5, 1905.

(d) Japan renounces all right, title and claim in connection with the League of Nations Mandate System, and accepts the action of the United Nations Security Council of April 2, 1947, extending the trusteeship system to the Pacific Islands formerly under mandate to Japan.

(e) Japan renounces all claim to any right or title to or interest in connection with any part of the Antarctic area, whether deriving from the activities of Japanese nationals or otherwise.

(f) Japan renounces all right, title and claim to the Spratly Islands and to the Paracel Islands.

Article 3

Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29 [degrees] north latitude (including the Ryukyu Islands and the Daito Islands), Nanpo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island-and the Volcano Islands) and Parece Vela and Marcus Island. Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters.

Article 4

(a) Subject to the provisions of paragraph (b) of this Article, the disposition of property of Japan and of its nationals in the areas referred to in Article 2, and their claims, including debts, against the authorities presently administering such areas and the residents (including jurisdical persons) thereof, and the disposition in Japan of property of such authorities and residents, and of claims, including debts, of such authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and such authorities. The property of any of the Allied Powers or its nationals in the areas referred to in Article 2 shall, insofar as this has not already been done, be returned by the administering authority in the condition in which it now exists. (The term nationals whenever used in the present Treaty includes juridical persons.)

(b) Japan recognizes the validity of dispositions of property of Japan and Japanese nationals made by or pursuant to directives of the United States Military

Government in any of the areas referred to in Articles 2 and 3.

(c) Japanese owned submarine cables connecting Japan with territory removed from Japanese control pursuant to the present Treaty shall be equally divided, Japan retaining the Japanese terminal and adjoining half of the cable, and the detached territory the remainder of the cable and connecting terminal facilities.

CHAPTER III

SECURITY

Article 5

(a) Japan accepts the obligations set forth in Article 2 of the Charter of the United Nations, and in particular the obligations

(i) to settle its international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered;

(ii) to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the Purposes of the United Nations;

(iii) to give the United Nations every assistance in any action it takes in accordance with the Charter and to refrain from giving assistance to any State against which the United Nations may take preventive or enforcement action.

(b) The Allied Powers confirm that they will be guided by the principles of Article 2 of the Charter of the United Nations in their relations with Japan.

(c) The Allied Powers for their part recognize that Japan as a sovereign nation possesses the inherent right of individual or collective self-defense referred to in Article 51 of the Charter of the United Nations and that Japan may voluntarily enter into collective security arrangements.

Article 6

(a) All occupation forces of the Allied Powers shall be withdrawn from Japan as soon as possible after the coming into force of the present Treaty, and in any case not later than 90 days thereafter. Nothing in this provision shall, however, prevent the stationing or retention of foreign armed forces in Japanese territory under or in consequence of any bilateral or multilateral agreements which have been or may be made between one or more of the Allied Powers, on the one hand, and Japan on the other.

(b) The provisions of Article 9 of the Potsdam Proclamation of July 26, 1945,[1] dealing with the return of Japanese military forces to their homes, to the extent not already completed, will be carried out.

(c) All Japanese property for which compensation has not already been paid, which was supplied for the use of the occupation forces and which remains in the possession of those forces at the time of the coming into force of the present Treaty, shall be returned to the Japanese Government within the same 90 days unless other arrangements are made by mutual agreement.

CHAPTER IV

POLITICAL AND ECONOMIC CLAUSES

Article 7

(a) Each of the Allied Powers, within one year after the present Treaty has come into force between it and Japan, will notify Japan which of its prewar bilateral treaties or conventions with Japan it wishes to continue in force or revive, and any treaties or conventions so notified shall continue in force or be revived subject only to such

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[1] Senate doc. 123, 81st Cong., 1st sess., p. 49.

amendments as may be necessary to ensure conformity with the present Treaty. The treaties and conventions so notified shall be considered as having been continued in force or revived three months after the date of notification and shall be registered with the Secretariat of the United Nations. All such treaties and conventions as to which Japan is not so notified shall be regarded as abrogated.

(b) Any notification made under paragraph (a) of this Article may except from the operation or revival of a treaty or convention any territory for the international relations of which the notifying Power is responsible, until three months after the date on which notice is given to Japan that such exception shall cease to apply.

Article 8

(a) Japan will recognize the full force of all treaties now or hereafter concluded by the Allied Powers for terminating the state of war initiated on September 1, 1939, as well as any other arrangements by the Allied Powers for or in connection with the restoration of peace. Japan also accepts the arrangements made for terminating the former League of Nations and Permanent Court of International Justice.

(b) Japan renounces all such rights and interests as it may derive from being a signatory power of the Conventions of St. Germain-en-Laye of September 10, 1919, and the Straits Agreement of Montreux of July 20, 1936, and from Article 16 of the Treaty of Peace with Turkey signed at Lausanne on July 24, 1923.

(c) Japan renounces all rights, title and interests acquired under, and is discharged from all obligations resulting from, the Agreement between Germany and the Creditor Powers of January 20, 1930, and its Annexes, including the Trust Agreement, dated May 17, 1930; the Convention of January 20, 1930, respecting the Bank for International Settlements; and the Statutes of the Bank for International Settlements. Japan will notify to the Ministry of Foreign Affairs in Paris

within six months of the first coming into force of the present Treaty its renunciation of the rights, title and interests referred to in this paragraph.

Article 9

Japan will enter promptly into negotiations with the Allied Powers so desiring for the conclusion of bilateral and multilateral agreements providing for the regulation or limitation of fishing and the conservation and development of fisheries on the high seas.

Article 10

Japan renounces all special rights and interests in China, including all benefits and privileges resulting from the provisions of the final Protocol signed at Peking on September 7, 1901,[1] and all annexes, notes and documents supplementary thereto, and agrees to the abrogation in respect to Japan of the said protocol, annexes, notes and documents.

Article 11

Japan accepts the judgments of the International Military Tribunal for the Far East and of other Allied War Crimes Courts both within and outside Japan, and will carry out the sentences imposed thereby upon Japanese nationals imprisoned in Japan. The power to grant clemency, to reduce sentences and to parole with respect to such prisoners may not be exercised except on the decision of the Government or Governments which imposed the sentence in each instance, and on the recommendation of Japan. In the case of persons sentenced by the International Military Tribunal for the Far East, such power may not be exercised except on the decision of a majority of the Governments represented on the Tribunal, and on the recommendation of Japan.

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[1] Treaty Series 397.

Article 12

(a) Japan declares its readiness promptly to enter into negotiations for the conclusion with each of the Allied Powers of treaties or agreements to place their trading, maritime and other commercial relations on a stable and friendly basis.

(b) Pending the conclusion of the relevant treaty or agreement, Japan will, during a period of four years from the first coming into force of the present Treaty
(1) accord to each of the Allied Powers, its nationals, products and vessels
(i) most-favored-nation treatment with respect to customs duties, charges, restrictions and other regulations on or in connection with the importation and exportation of goods;
(ii) national treatment with respect to shipping, navigation and imported goods, and with respect to natural and juridical persons and their interests - such treatment to include all matters pertaining to the levying and collection of taxes, access to the courts, the making and performance of contracts, rights to property (tangible and intangible), participation in juridical entities constituted under Japanese law, and generally the conduct of all kinds of business and professional activities;
(2) ensure that external purchases and sales of Japanese state trading enterprises shall be based solely on commercial considerations.

(c) In respect to any matter, however, Japan shall be obliged to accord to an Allied Power national treatment, or most-favored-nation treatment, only to the extent that the Allied Power concerned accords Japan national treatment or most-favored-nation treatment, as the case may be, in respect of the same matter. The reciprocity envisaged in the foregoing sentence shall be determined, in the case of products, vessels and juridical entities of, and persons domiciled in, any non-metropolitan territory of an Allied Power, and in the case of juridical entities of, and persons

domiciled in, any state or province of an Allied Power having a federal government, by reference to the treatment accorded to Japan in such territory, state or province.

(d) In the application of this Article, a discriminatory measure shall not be considered to derogate from the grant of national or most-favored-nation treatment, as the case may be, if such measure is based on an exception customarily provided for in the commercial treaties of the party applying it, or on the need to safeguard that party's external financial position or balance of payments (except in respect to shipping and navigation), or on the need to maintain its essential security interests, and provided such measure is proportionate to the circumstances and not applied in an arbitrary or unreasonable manner.

(e) Japan's obligations under this Article shall not be affected by the exercise of any Allied rights under Article 14 of the present Treaty; nor shall the provisions of this Article be understood as limiting the undertakings assumed by Japan by virtue of Article 15 of the Treaty.

Article 13

(a) Japan will enter into negotiations with any of the Allied Powers, promptly upon the request of such Power or Powers, for the conclusion of bilateral or multilateral agreements relating to international civil air transport.

(b) Pending the conclusion of such agreement or agreements, Japan will, during a period of four years from the first coming into force of the present Treaty, extend to such Power treatment not less favorable with respect to air-traffic rights and privileges than those exercised by any such Powers at the date of such coming into force, and will accord complete equality of opportunity in respect to the operation and development of air services.

(c) Pending its becoming a party to the Convention on International Civil Aviation in accordance with Article 93

thereof, Japan will give effect to the provisions of that Convention applicable to the international navigation of aircraft, and will give effect to the standards, practices and procedures adopted as annexes to the Convention in accordance with the terms of the Convention.

CHAPTER V

CLAIMS AND PROPERTY

Article 14

(a) It is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless it is also recognized that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations.

Therefore,

1. Japan will promptly enter into negotiations with Allied Powers so desiring, whose present territories were occupied by Japanese forces and damaged by Japan, with a view to assisting to compensate those countries for the cost of repairing the damage done, by making available the services of the Japanese people in production, salvaging and other work for the Allied Powers in question. Such arrangements shall avoid the imposition of additional liabilities on other Allied Powers, and, where the manufacturing of raw materials is called for, they shall be supplied by the Allied Powers in question, so as not to throw any foreign exchange burden upon Japan.

2. (I) Subject to the provisions of sub-paragraph (II) below, each of the Allied Powers shall have the right to seize, retain, liquidate or otherwise dispose of all property, rights and interests of

(a) Japan and Japanese nationals,

(b) persons acting for or on behalf of Japan or Japanese nationals, and

(c) entities owned or controlled by Japan or Japanese nationals, which on the first coming into force of the present Treaty were subject to its jurisdiction. The property, rights and interests specified in this sub-paragraph shall include those now blocked, vested or in the possession or under the control of enemy property authorities of Allied Powers, which belonged to, or were held or managed on behalf of, any of the persons or entities mentioned in (a), (b) or (c) above at the time such assets came under the controls of such authorities.

(II) The following shall be excepted from the right specified in subparagraph (I) above:
(i) property of Japanese natural persons who during the war resided with the permission of the Government concerned in the territory of one of the Allied Powers, other than territory occupied by Japan, except property subjected to restrictions during the war and not released from such restrictions as of the date of the first coming into force of the present Treaty;
(ii) all real property, furniture and fixtures owned by the Government of Japan and used for diplomatic or consular purposes, and all personal furniture and furnishings and other private property not of an investment nature which was normally necessary for the carrying out of diplomatic and consular functions, owned by Japanese diplomatic and consular personnel;
(iii) property belonging to religious bodies or private charitable institutions and used exclusively for religious or charitable purposes;
(iv) property, rights and interests which have come within its jurisdiction in consequence of the resumption of trade and financial relations subsequent to September 2, 1945, between the country concerned and Japan, except such as have resulted from transactions contrary to the laws of the Allied Power concerned;

(v) obligations of Japan or Japanese nationals, any right, title or interest in tangible property located in Japan, interests in enterprises organized under the laws of Japan, or any paper evidence thereof; provided that this exception shall only apply to obligations of Japan and its nationals expressed in Japanese currency.

(III) Property referred to in exceptions (i) through (v) above shall be returned subject to reasonable expenses for its preservation and administration. If any such property has been liquidated the proceeds shall be returned instead.

(IV) The right to seize, retain, liquidate or otherwise dispose of property as provided in sub-paragraph (I) above shall be exercised in accordance with the laws of the Allied Power concerned, and the owner shall have only such rights as may be given him by those laws.

(V) The Allied Powers agree to deal with Japanese trademarks and literary and artistic property rights on a basis as favorable to Japan as circumstances ruling in each country will permit.

(b) Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

Article 15

(a) Upon application made within nine months of the coming into force of the present Treaty between Japan and the Allied Power concerned, Japan will, within six months of the date of such application, return the property, tangible and intangible, and all rights or interests of any kind in Japan of each Allied Power and its nationals which was within Japan at any time between December 7, 1941, and September 2, 1945, unless the owner has freely disposed thereof without

duress or fraud. Such property shall be returned free of all encumbrances and charges to which it may have become subject because of the war, and without any charges for its return. Property whose return is not applied for by or on behalf of the owner or by his Government within the prescribed period may be disposed of by the Japanese Government as it may determine. In cases where such property was within Japan on December 7, 1941, and cannot be returned or has suffered injury or damage as a result of the war, compensation will be made on terms not less favorable than the terms provided in the draft Allied Powers Property Compensation Law approved by the Japanese Cabinet on July 13, 1951.

(b) With respect to industrial property rights impaired during the war, Japan will continue to accord to the Allied Powers and their nationals benefits no less than those heretofore accorded by Cabinet Orders No. 309 effective September 1, 1949, No. 12 effective January 28, 1950, and No. 9 effective February 1, 1950, all as now amended, provided such nationals have applied for such benefits within the time limits prescribed therein.

(c)(i) Japan acknowledges that the literary and artistic property rights which existed in Japan on December 6, 1941, in respect to the published and unpublished works of the Allied Powers and their nationals have continued in force since that date, and recognizes those rights which have arisen, or but for the war would have arisen, in Japan since that date, by the operation of any conventions and agreements to which Japan was a party on that date, irrespective of whether or not such conventions or agreements were abrogated or suspended upon or since the outbreak of war by the domestic law of Japan or of the Allied Power concerned.

(ii) Without the need for application by the proprietor of the right and without the payment of any fee or compliance with any other formality, the period from December 7, 1941,

until the coming into force of the present Treaty between Japan and the Allied Power concerned shall be excluded from the running of the normal term of such rights; and such period, with an additional period of six months, shall be excluded from the time within which a literary work must be translated into Japanese in order to obtain translating rights in Japan.

Article 16

As an expression of its desire to indemnify those members of the armed forces of the Allied Powers who suffered undue hardships while prisoners of war of Japan, Japan will transfer its assets and those of its nationals in countries which were neutral during the war, or which were at war with any of the Allied Powers, or, at its option, the equivalent of such assets, to the International Committee of the Red Cross which shall liquidate such assets and distribute the resultant fund to appropriate national agencies, for the benefit of former prisoners of war and their families on such basis as it may determine to be equitable. The categories of assets described in Article 14 (a) 2(II) (ii) through (v) of the present Treaty shall be excepted from transfer, as well as assets of Japanese natural persons not residents of Japan on the first coming into force of the Treaty. It is equally understood that the transfer provision of this Article has no application to the 19,770 shares in the Bank for International Settlements presently owned by Japanese financial institutions.

Article 17

(a) Upon the request of any of the Allied Powers, the Japanese Government shall review and revise in conformity with international law any decision or order of the Japanese Prize Courts in cases involving ownership rights of nationals of that Allied Power and shall supply copies of all documents comprising the records of these cases, including the decisions taken and orders issued. In any case in which

such review or revision shows that restoration is due, the provisions of Article 15 shall apply to the property concerned.

(b) The Japanese Government shall take the necessary measures to enable nationals of any of the Allied Powers at any time within one year from the coming into force of the present Treaty between Japan and the Allied Power concerned to submit to the appropriate Japanese authorities for review any judgment given by a Japanese court between December 7, 1941, and such coming into force, in any proceedings in which any such national was unable to make adequate presentation of his case either as plaintiff or defendant. The Japanese Government shall provide that, where the national has suffered injury by reason of any such judgment, he shall be restored in the position in which he was before the judgment was given or shall be afforded such relief as may be just and equitable in the circumstances.

Article 18

(a) It is recognized that the intervention of the state of war has not affected the obligation to pay pecuniary debts arising out of obligations and contracts (including those in respect of bonds) which existed and rights which were acquired before the existence of a state of war, and which are due by the Government or nationals of Japan to the Government or nationals of one of the Allied Powers, or are due by the Government or nationals of one of the Allied Powers to the Government or nationals of Japan. The intervention of a state of war shall equally not be regarded as affecting the obligation to consider on their merits claims for loss or damage to property or for personal injury or death which arose before the existence of a state of war, and which may be presented or re-presented by the Government of one of the Allied Powers to the Government of Japan, or by the Government of Japan to any of the Governments of the Allied Powers. The provisions of this paragraph are without prejudice to the rights conferred by Article 14.

(b) Japan affirms its liability for the prewar external debt of the Japanese State and for debts of corporate bodies subsequently declared to be liabilities of the Japanese State, and expresses its intention to enter into negotiations at an early date with its creditors with respect to the resumption of payments on those debts; to encourage negotiations in respect to other prewar claims and obligations; and to facilitate the transfer of sums accordingly.

Article 19

(a) Japan waives all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war or out of actions taken because of the existence of a state of war, and waives all claims arising from the presence, operations or actions of forces or authorities of any of the Allied Powers in Japanese territory prior to the coming into force of the present Treaty.

(b) The foregoing waiver includes any claims arising out of actions taken by any of the Allied Powers with respect to Japanese ships between September 1, 1939, and the coming into force of the present Treaty, as well as any claims and debts arising in respect to Japanese prisoners of war and civilian internees in the hands of the Allied Powers, but does not include Japanese claims specifically recognized in the laws of any Allied Power enacted since September 2, 1945.

(c) Subject to reciprocal renunciation, the Japanese Government also renounces all claims (including debts) against Germany and German nationals on behalf of the Japanese Government and Japanese nationals, including intergovernmental claims and claims for loss or damage sustained during the war, but excepting (a) claims in respect of contracts entered into and rights acquired before September 1, 1939, and (b) claims arising out of trade and financial relations between Japan and Germany after September 2, 1945. Such renunciation shall not prejudice

actions taken in accordance with Articles 16 and 20 of the present Treaty.

(d) Japan recognizes the validity of all acts and omissions done during the period of occupation under or in consequence of directives of the occupation authorities or authorized by Japanese law at that time, and will take no action subjecting Allied nationals to civil or criminal liability arising out of such acts or omissions.

Article 20

Japan will take all necessary measures to ensure such disposition of German assets in Japan as has been or may be determined by those powers entitled under the Protocol of the proceedings of the Berlin Conference of 1945[1] to dispose of those assets, and pending the final disposition of such assets will be responsible for the conservation and administration thereof.

Article 21

Notwithstanding the provisions of Article 25 of the present Treaty, China shall be entitled to the benefits of Articles 10 and 14(a)2; and Korea to the benefits of Articles 2, 4, 9 and 12 of the present Treaty.

CHAPTER VI

SETTLEMENT OF DISPUTES

Article 22

If in the opinion of any Party to the present Treaty there has arisen a dispute concerning the interpretation or execution of the Treaty, which is not settled by reference to a special claims tribunal or by other agreed means, the dispute shall, at the request of any party thereto, be referred for decision to the International Court of Justice. Japan and

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[1] Senate doc. 123, 81st Cong., 1st sess., p. 34.

those Allied Powers which are not already parties to the Statute of the International Court of Justice will deposit with the Registrar of the Court, at the time of their respective ratifications of the present Treaty, and in conformity with the resolution of the United Nations Security Council, dated October 15, 1946,[1] a general declaration accepting the jurisdiction, without special agreement, of the Court generally in respect to all disputes of the character referred to in this Article.

CHAPTER VII

FINAL CLAUSES

Article 23

(a) The present Treaty shall be ratified by the States which sign it, including Japan, and will come into force for all the States which have then ratified it, when instruments of ratification have been deposited by Japan and by a majority, including the United States of America as the principal occupying Power, of the following States, namely Australia, Canada, Ceylon, France, Indonesia, the Kingdom of the Netherlands, New Zealand, Pakistan, the Republic of the Philippines, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. The present Treaty shall come into force for each State which subsequently ratifies it, on the date of the deposit of its instrument of ratification.

(b) If the Treaty has not come into force within nine months after the date of the deposit of Japan's ratification, any State which has ratified it may bring the Treaty into force between itself and Japan by a notification to that effect given to the Governments of Japan and the United States of America not later than three years after the date of deposit of Japan's ratification.

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[1] U. N. Sec. Council Official Records, 1st year: 2d Series, No. 19.

Article 24

All instruments of ratification shall be deposited with the Government of the United States of America which will notify all the signatory States of each such deposit, of the date of the coming into force of the Treaty under paragraph (a) of Article 23, and of any notifications made under paragraph (b) of Article 23.

Article 25

For the purposes of the present Treaty the Allied Powers shall be the States at war with Japan, or any State which previously formed a part of the territory of a State named in Article 23, provided that in each case the State concerned has signed and ratified the Treaty. Subject to the provisions of Article 21, the present Treaty shall not confer any rights, titles or benefits on any State which is not an Allied Power as herein defined; nor shall any right, title or interest of Japan be deemed to be diminished or prejudiced by any provision of the Treaty in favor of a State which is not an Allied Power as so defined.

Article 26

Japan will be prepared to conclude with any State which signed or adhered to the United Nations Declaration of January 1, 1942, and which is at war with Japan, or with any State which previously formed a part of the territory of a State named in Article 23, which is not a signatory of the present Treaty, a bilateral Treaty of Peace on the same or substantially the same terms as are provided for in the present Treaty, but this obligation on the part of Japan will expire three years after the first coming into force of the present Treaty. Should Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty.

Article 27

The present Treaty shall be deposited in the archives of the Government of the United States of America which shall furnish each signatory State with a certified copy thereof.

IN FAITH WHEREOF the undersigned Plenipotentiaries have signed the present Treaty.

DONE at the city of San Francisco this eighth day of September 1951, in the English, French, and Spanish languages, all being equally authentic, and in the Japanese language.

I CERTIFY THAT the foregoing is a true copy of the Treaty of Peace with Japan which was signed in the English, French, Spanish, and Japanese languages at San Francisco on September 8, 1951, the signed original of which is deposited in the archives of the Government of the United States of America.

IN TESTIMONY WHEREOF, I, DEAN ACHESON, Secretary of State of the United States of America, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer of the said Department, at the city of Washington, in the District of Columbia, this tenth day of September, 1951.

DEAN ACHESON

Secretary of State

By M. P. CHAUVIN

Authentication Officer Department of State

WHEREAS the Senate of the United States of America by their resolution of March 20, 1952, two-thirds of the Senators present concurring therein, did advise and consent to the ratification of the said Treaty with the following declaration:

"As part of such advice and consent the Senate states that nothing the treaty contains is deemed to diminish or prejudice, in favor of the Soviet Union, the right, title, and interest of Japan, or the Allied Powers as defined in said treaty, in and to South Sakhalin and its adjacent islands, the Kurile Islands, the Habomai Islands, the island of Shikotan, or any other territory, rights, or interests possessed by Japan on December 7, 1941, or to confer any right, title, or benefit therein or thereto on the Soviet Union; and also that nothing in the said treaty, or the advice and consent of the Senate to the ratification thereof, implies recognition on the part of the United States of the provisions in favor of the Soviet Union contained in the so-called 'Yalta agreement' regarding Japan of February 11, 1945."

WHEREAS the said Treaty was duly ratified by the President of the United States of America on April 15, 1952, in pursuance of the aforesaid advice and consent of the Senate and subject to the aforesaid declaration;

WHEREAS it is provided in Article 23 of the said Treaty that the Treaty will come into force for all the States which have then ratified it when instruments of ratification have been deposited by Japan and by a majority, including the United States of America as the principal occupying Power, of the following States, namely Australia, Canada, Ceylon,[1] France, Indonesia, the Kingdom of the Netherlands, New Zealand, Pakistan, the Republic of the Philippines, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, and in Article 24 of the said Treaty that all instruments of ratification shall be deposited with the Government of the United States of America;

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[1] Ratification deposited Apr. 28, 1952.

WHEREAS instruments of ratification of the said Treaty were deposited with the Government of the United States of America by Japan on November 28, 1951 and by the United Kingdom of Great Britain and Northern Ireland on January 3, 1952, by Australia on April 10, 1952, by New Zealand on April 10, 1952, by Canada on April 17, 1952, by Pakistan on April 17, 1952, by France on April 18, 1952, and by the United States of America on April 28, 1952;

WHEREAS instruments of ratification were also deposited with the Government of the United States of America by Mexico on March 3, 1952 and by Argentina on April 9, 1952;

AND WHEREAS, pursuant to the aforesaid provisions of Article 23 of the said Treaty, the Treaty came into force on April 28, 1952;

NOW, THEREFORE, be it known that I, Harry S. Truman, President of the United States of America, do hereby proclaim and make public the said Treaty of Peace with Japan to the end that the same and every article and clause thereof, subject to the declaration hereinbefore recited, shall be observed and fulfilled with good faith, on and after April 28, 1952, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof, and do hereby further proclaim that the state of war between the United States of America and Japan terminated on April 28, 1952.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this twenty-eighth day of April in the year of our Lord one thousand nine hundred fifty-two and of the Independence of the United States of America the one hundred seventy-sixth.

HARRY S TRUMAN

By the President:
DEAN ACHESON
Secretary of State

DECLARATION

With respect to the Treaty of Peace signed this day, the Government of Japan makes the following Declaration:

1. Except as otherwise provided in the said Treaty of Peace, Japan recognizes the full force of all presently effective multilateral international instruments to which Japan was a party on September 1, 1939, and declares that it will, on the first coming into force of the said Treaty, resume all its rights and obligations under those instruments. Where, however, participation in any instrument involves membership in an international organization of which Japan ceased to be a member on or after September 1, 1939, the provisions of the present paragraph shall be dependent on Japan's readmission to membership in the organization concerned.

2. It is the intention of the Japanese Government formally to accede to the following international instruments within the shortest practicable time, not to exceed one year from the first coming into force of the Treaty of Peace:
(1) Protocol opened for signature at Lake Success on December 11, 1946, amending the agreements, conventions and protocols on narcotic drugs of January 23, 1912, February 11, 1925, February 19, 1925, July 13, 1931, November 27, 1931, and June 26, 1936;
(2) Protocol opened for signature at Paris on November 19, 1948, bringing under international control drugs outside the scope of the convention of July 13, 1931, for limiting the manufacture and regulating the distribution of narcotic drugs, as amended by the protocol signed at Lake Success on December 11, 1946;

(3) International Convention on the Execution of Foreign Arbitral Awards signed at Geneva on September 26, 1927;
(4) International Convention relating to Economic Statistics with protocol signed at Geneva on December 14, 1928, and Protocol amending the International Convention of 1928 relating to Economic Statistics signed at Paris on December 9, 1948;
(5) International Convention relating to the Simplification of Customs Formalities, with protocol of signature, signed at Geneva on November 3, 1923;
(6) Agreement of Madrid of April 14, 1891, for the Prevention of False Indications of Origin of Goods, as revised at Washington on June 2, 1911, at The Hague on November 6, 1925, and at London on June 2, 1934;
(7) Convention for the Unification of Certain Rules relating to International Transportation by Air, and additional protocol, signed at Warsaw on October 12, 1929;
(8) Convention on Safety of Life at Sea opened for signature at London on June 10, 1948;
(9) Geneva conventions of August 12, 1949, for the protection of war victims.

3. It is equally the intention of the Japanese Government, within six months of the first coming into force of the Treaty of Peace, to apply for Japan's admission to participation in (a) the Convention on International Civil Aviation opened for signature at Chicago on December 7, 1944, and, as soon as Japan is itself a party to that Convention, to accept the International Air Services Transit Agreement also opened for signature at Chicago on December 7, 1944; and (b) the Convention of the World Meteorological Organization opened for signature at Washington on October 11, 1947.

DONE at the city of San Francisco this eighth day of September 1951.

DECLARATION

With respect to the Treaty of Peace signed this day, the Government of Japan makes the following Declaration:

Japan will recognize any Commission, Delegation or other Organization authorized by any of the Allied Powers to identify, list, maintain or regulate its war graves, cemeteries and memorials in Japanese territory; will facilitate the work of such Organizations; and will, in respect of the abovementioned war graves, cemeteries and memorials, enter into negotiations for the conclusion of such agreements as may prove necessary with the Allied Power concerned, or with any Commission, Delegation or other Organization authorized by it.

Japan trusts that the Allied Powers will enter into discussions with the Japanese Government with a view to arrangements being made for the maintenance of any Japanese war graves or cemeteries which may exist in the territories of the Allied Powers and which it is desired to preserve.

DONE at the city of San Francisco this eighth day of September 1951.

I CERTIFY THAT the foregoing is a true copy of each of the two Declarations made by the Government of Japan and signed on its behalf in the English, French, Spanish, and Japanese languages at San Francisco on September 8, 1951, the signed originals of which are deposited in the archives of the Government of the United States of America.

IN TESTIMONY WHEREOF, I, DEAN ACHESON, Secretary of State of the United States of America, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer of the said Department, at the city of Washington, in the District of Columbia, this tenth day of September, 1951.

The Secretary of State to the Japanese Prime Minister

UNITED STATES DELEGATION

SAN FRANCISCO

September 8, 1951

EXCELLENCY:

Upon the coming into force of the Treaty of Peace signed today, Japan will assume obligations expressed in Article 2 of the Charter of the United Nations which requires the giving to the United Nations of "every assistance in any action it takes in accordance with the present Charter".

As we know, armed aggression has occurred in Korea, against which the United Nations and its members are taking action. There has been established a unified command of the United Nations under the United States pursuant to Security Council Resolution of July 7, 1950,[1] and the General Assembly, by Resolution of February 1, 1951,[2] has called upon all states and authorities to lend every assistance to the United Nations action and to refrain from giving any assistance to the aggressor. With the approval of SCAP,[3] Japan has been and now is rendering important assistance to the United Nations action in the form of facilities and services made available to the members of the United Nations, the Armed Forces of which are participating in the United Nations action.

Since the future is unsettled and it may unhappily be that the occasion for facilities and services in Japan in support of United Nations action will continue or recur, I would appreciate confirmation, on behalf of your Government, that if and when the forces of a member or members of the United Nations are engaged in any United Nations action in

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[1] U. N. doc. S/1588

[2] Resolution 498 (V).

[3] Supreme Commander for the Allied Powers.

the Far East after the Treaty of Peace comes into force, Japan will permit and facilitate the support in and about Japan, by the member or members, of the forces engaged in such United Nations action; the expenses involved in the use of Japanese facilities and services to be borne as at present or as otherwise mutually agreed between Japan and the United Nations member concerned. In so far as the United States is concerned the use of facilities and services, over and above those provided to the United States pursuant to the Administrative Agreement which will implement the Security Treaty between the United States and Japan, would be at United States expense, as at present.

Accept, Excellency, the assurances of my most distinguished consideration.

The Japanese Prime Minister to the Secretary of State

JAPANESE DELEGATION

SAN FRANCISCO

September 8, 1951

EXCELLENCY:

I have the honor to acknowledge the receipt of Your Excellency's Note of today's date in which Your Excellency has informed me as follows:

Upon the coming into force of the Treaty of Peace signed today, Japan will assume the obligations expressed in Article 2 of the Charter of the United Nations which requires the giving to the United Nations of "every assistance in any action it takes in accordance with the present Charter."

As we know, armed aggression has occurred in Korea, against which the United Nations and its Members are taking action. There has been established a Unified Command of the United Nations under the United States pursuant to Security Council Resolution of July 7, 1950, and the General

Assembly, by Resolution of February 1, 1951, has called upon all states and authorities to lend every assistance to the United Nations action and to refrain from giving any assistance to the aggressor. With the approval of SCAP, Japan has been and now is rendering important assistance to the United Nations action in the form of facilities and services made available to the Members of the United Nations, the armed forces of which are participating in the United Nations action.

Since the future is unsettled and it may unhappily be that the occasion for facilities and services in Japan in support of United Nations action will continue or recur, I would appreciate confirmation, on behalf of your Government, that if and when the forces of a Member or Members of the United Nations are engaged in any United Nations action in the Far East after the Treaty of Peace comes into force, Japan will permit and facilitate the support in and about Japan, by the Member or Members, of the forces engaged in such United Nations actions; the expenses involved in the use of Japanese facilities and services to be borne as at present or as otherwise mutually agreed between Japan and the United Nations Member concerned. In so far as the United States is concerned the use of facilities and services, over and above those provided to the United States pursuant to the Administrative Agreement which will implement the Security Treaty between the United States and Japan, would be at United States expense, as at present.

With full cognizance of the contents of Your Excellency's Note, I have the honor, on behalf of my Government, to confirm that if and when the forces of a Member or Members of the United Nations are engaged in any United Nations action in the Far East after the Treaty of Peace comes into force, Japan will permit and facilitate the support in and about Japan, by the Member or Members of the forces engaged in such United Nations action, the expenses involved in the use of Japanese facilities and

services to be borne as at present or as otherwise mutually agreed between Japan and the United Nations Member concerned. In so far as the United States is concerned the use of facilities and services, over and above those provided to the United States pursuant to the Administrative Agreement which will implement the Security Agreement between Japan and the United States would be at United States expense, as at present.

Accept, Excellency, the assurance of my most distinguished consideration.

Note by the Department of State

Signatures affixed to the Treaty of Peace with Japan are as follows:

FOR ARGENTINA:

HIPOLITO J. PAZ

FOR AUSTRALIA:

PERCY C SPENDER

FOR THE KINGDOM OF BELGIUM:

PAUL VAN ZEELAND

SILVERCRUYS.

FOR BOLIVIA:

LUIS GUACHALLA

FOR BRAZIL:

CARLOS MARTINS

A. DE MELLO-FRANCO

FOR CAMBODIA:

PHLENG

FOR CANADA:

LESTER B PEARSON

R W MAYHEW

FOR CEYLON:

J. R. JAYEWARDENE

G. C. S. COREA

R. G. SENANAYAKE

FOR CHILE:

F. NIETO DEL RIO

FOR COLOMBIA:

CIPRIANO RESTREPO JARAMILL

SEBASTIAN OSPINA

FOR COSTA RICA:

J RAFAEL OREAMUNO.

V. VARGAS ALFARO

LUIS DOBLES SANCHEZ

FOR CUBA:

O GANS

L. MACHADO

JOAQUIN MEYER

FOR THE DOMINICAN REPUBLIC:

V. ORDONEZ

LUIS F. THOMEN

FOR ECUADOR:

A QUEVEDO

R G VALENZUELA

FOR EGYPT:

KAMIL A. RAHIM

FOR EL SALVADOR:

HECTOR DAVID CASTRO

LUIS RIVAS PALACIOS

FOR ETHIOPIA:

MEN YAYEHIRAD

FOR FRANCE:

SCHUMAN

H BONNET

PAUL-EMILE NAGGIAR

FOR GREECE:

A. G. POLITIS

FOR GUATEMALA:

E CASTILLO A

A M ORELLANA

J MENDOZA

FOR HAITI:

JACQUES N. LEGER

GUST LARAQUE

FOR HONDURAS:

J. E. VALENZUELA.

ROBERTO GALVEZ B.

RAUL ALVARADO T

FOR INDONESIA:

AHMAD SUBARDJO.

FOR IRAN:

A G ARDALAN

FOR IRAQ:

A. I. BAKR

FOR LAOS:

SAVANG

FOR LEBANON:

CHARLES MALIK

FOR LIBERIA:

GABRIEL L DENNIS

JAMES ANDERSON

RAYMOND HORACE

J. RUDOLPH GRIMES

FOR THE GRAND DUCHY OF LUXEMBOURG:

HUGUES LE GALLAIS

FOR MEXICO:

RAFAEL DE LA COLINA

GUSTAVO DIAZ ORDAZ

A. P. GASGA

FOR THE KINGDOM OF THE NETHERLANDS:

D U STIKKER

J H VAN ROIJEN.

FOR NEW ZEALAND:

C BERENDSEN

FOR NICARAGUA:

G SEVILLA SACASA

GUSTAVO MANZANARES

FOR THE KINGDOM OF NORWAY:

WILHELM MUNTHE MORGENSTIERNE

FOR PAKISTAN:

ZAFRULLA KHAN

FOR PANAMA:

IGNACIO MOLINO

JOSE A REMON

ALFREDO ALEMAN

J. CORDOVEZ

FOR PARAGUAY:

LUIS OSCAR BOETTNER

FOR PERU:

F BERCKEMEYER.

FOR THE REPUBLIC OF THE PHILIPPINES:

CARLOS P. ROMULO

J M ELIZALDE

VICENTE FRANCISCO

DIOSDADO MACAPAGAL

EMILIANO T. TIRONA

V. G. SINCO

FOR SAUDI ARABIA:

ASAD AL-FAQIH

FOR SYRIA:

F. EL-KHOURI

FOR THE REPUBLIC OF TURKEY:

FERIDUN C ERKIN

FOR THE UNION OF SOUTH AFRICA:

G. P JOOSTE

FOR THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND:

HERBERT MORRISON.

KENNETH YOUNGER

OLIVER FRANKS

FOR THE UNITED STATES OF AMERICA:

DEAN ACHESON

JOHN FOSTER DULLES

ALEXANDER WILEY

JOHN J. SPARKMAN

FOR URUGUAY:

JOSE A. MORA

FOR VENEZUELA:

Ad referendum

ANTONIO M. ARAUJO

R. GALLEGOS M.

FOR VIET NAM:

T. V. HUU

T. VINH

D. THANH

BUU KINH

FOR JAPAN:

SHIGERU YOSHIDA

HAYATO IKEDA

GIZO TOMABECHI

NIRO HOSHIJIMA

MUNEYOSHI TOKUGAWA.

HISATO ICHIMADA

[FOREIGN LANGUAGE TEXT OMITTED]

Shigeru Yoshida.

Hayato Ikeda.

Gizo Tomabechi.

Niro Hoshijima.

Muneyoshi Tokugawa.

Hisato Ichimada.

DEAN ACHESON

California Code of Civil Procedure

354.6. (a) As used in this section:

(1) "Second World War slave labor victim" means any person taken from a concentration camp or ghetto or diverted from transportation to a concentration camp or from a ghetto to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers.

(2) "Second World War forced labor victim" means any person who was a member of the civilian population conquered by the Nazi regime, its allies or sympathizers, or prisoner-of-war of the Nazi regime, its allies or sympathizers, forced to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers.

(3) "Compensation" means the present value of wages and benefits that individuals should have been paid and damages for injuries sustained in connection with the labor performed. Present value shall be calculated on the basis of the market value of the services at the time they were performed, plus interest from the time the services were performed, compounded annually to date of full payment without diminution for wartime or postwar currency devaluation.

(b) Any Second World War slave labor victim, or heir of a Second World War slave labor victim, Second World War forced labor victim, or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate.

That action may be brought in a superior court of this state, which court shall have jurisdiction over that action until its completion or resolution.

(c) Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010.

Agreement

between

the Government of the Federal Republic of Germany

and

the Government of the United States of America

concerning

the Foundation

"Remembrance, Responsibility and the Future"

The Government of the Federal Republic of Germany
and
the Government of the United States of America

Intending to shape relations between their two States in a spirit of friendship and cooperation for the future and to successfully resolve issues stemming from the past,

Recognizing that the Federal Republic of Germany has, building on Allied legislation and in close consultation with victims' associations and interested Governments, provided, in an unprecedented manner, comprehensive and extensive restitution and compensation to victims of National Socialist persecution,

Noting the historic announcement on February 16, 1999, made by the Federal Chancellor and German companies, in which the companies stated their intention to establish a foundation to compensate forced laborers and others who suffered at the hands of German companies during the National Socialist era and World War II,

Noting that, by means of the Foundation Initiative, its member companies wish to respond to the moral responsibility of German business arising from the use of forced laborers and from damage to property caused by persecution, and from all other wrongs suffered during the National Socialist era and World War II,

Recognizing as legitimate the interest German companies have in all-embracing and enduring legal peace in this matter, and further recognizing that such interest was fundamental to the establishment of the Foundation Initiative,

Noting that the two Governments announced that they welcomed and support the Foundation Initiative,

Noting that the Federal Republic of Germany and German companies have since agreed on the creation of a single Foundation, "Remembrance, Responsibility and the Future" (the "Foundation"), formed under German federal law as an instrumentality of the Federal Republic of Germany and funded by contributions from the Federal Republic of Germany and the German companies,

Recognizing that German business, having contributed substantially to the Foundation, should not be asked or expected to contribute again, in court or elsewhere, for the use of forced laborers or for any wrongs asserted against German companies arising from the Nationalist Socialist era and World War II,

Recognizing that it is in the interest of both parties to have a resolution of these issues that is non-adversarial and non-confrontational, outside of litigation,

Recognizing that both parties desire all-embracing and enduring legal peace to advance their foreign policy interests,

Noting in this regard the June 16, 2000, letter of the Assistant to the President of the United States for National Security Affairs and the Counsel to the President of the United States and the July 5, 2000, letter of the Foreign Policy and Security Advisor of the Chancellor of the Federal Republic of Germany, copies of which have been made public,

Having worked as partners, in consultation with other interested parties and governments, to assist German companies to achieve wide support for the total amount of funds and the eligibility criteria of the Foundation and for the establishment of all-embracing and enduring legal peace,

Noting that the Foundation will assure broad coverage of victims and broad participation by companies which would not be possible through judicial proceedings,

Believing that the Foundation will provide as expeditious as possible a mechanism for making fair and speedy payments to now elderly victims,

Having in mind that the Foundation covers, and that it would be in the interests of both parties for the Foundation to be the exclusive remedy and forum for addressing, all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II,

Recalling that for the last 55 years the parties have sought to work to address the consequences of the National Socialist era and World War II through political and governmental acts between the United States and the Federal Republic of Germany,

Noting that this Agreement and the establishment of the Foundation represent a fulfillment of these efforts,

Recognizing that the German Government has tabled a Bill before the German Federal Parliament ("Bundestag") to establish the Foundation –

Have agreed as follows:

Article 1

(1) The parties agree that the Foundation "Remembrance, Responsibility and the Future" covers, and that it would be in their interests for the Foundation to be the exclusive remedy and forum for the resolution of, all claims that have

been or may be asserted against German companies arising from the National Socialist era and World War II.

(2) The Federal Republic of Germany agrees to ensure that the Foundation shall provide appropriately extensive publicity concerning its existence, its objectives and the availability of funds.

(3) Annex A sets forth the principles that shall govern the operation of the Foundation. The Federal Republic of Germany assures that the Foundation will be subject to legal supervision by a German governmental authority; any person may request that the German governmental authority take measures to ensure compliance with the legal requirements of the Foundation.

(4) The Federal Republic of Germany agrees that insurance claims that come within the scope of the current claims handling procedures adopted by the International Commission of Holocaust Era Insurance Claims ("ICHEIC") and are made against German insurance companies shall be processed by the companies and the German Insurance Association on the basis of such procedures and on the basis of additional claims handling procedures that may be agreed among the Foundation, ICHEIC, and the German Insurance Association.

Article 2

(1) The United States shall, in all cases in which the United States is notified that a claim described in article 1 (1) has been asserted in a court in the United States, inform its courts through a Statement of Interest, in accordance with Annex B, and, consistent therewith, as it otherwise considers appropriate, that

it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims asserted against German companies as defined in Annex C and that dismissal of such cases would be in its foreign policy interest.

(2) The United States, recognizing the importance of the objectives of this agreement, including all-embracing and enduring legal peace, shall, in a timely manner, use its best efforts, in a manner it considers appropriate, to achieve these objectives with state and local governments.

Article 3

(1) This agreement is intended to complement the creation of the Foundation and to foster all-embracing and enduring legal peace for German companies with respect to the National Socialist era and World War II.

(2) This agreement shall not affect unilateral decisions or bilateral or multilateral agreements that dealt with the consequences of the National Socialist era and World War II.

(3) The United States will not raise any reparations claims against the Federal Republic of Germany.

(4) The United States shall take appropriate steps to oppose any challenge to the sovereign immunity of the Federal Republic of Germany with respect to any claim that may be asserted against the Federal Republic of Germany concerning the consequences of the National Socialist era and World War II.

Article 4

Annexes A, B and C shall be an integral part of this Agreement.

Article 5

This Agreement shall enter into force on the date on which the parties agree by exchange of notes.

DONE at Berlin on the 17th day of July, 2000, in duplicate in the German and English languages, both texts being equally authentic.

For the Government of the Federal Republic of Germany	For the Government of the Unites States of America

Annex B

of the

Agreement

between

the Government of the Federal Republic of Germany

and

the Government of the United States of America

concerning

the Foundation

"Remembrance, Responsibility and the Future"

Elements of U.S. Government Statement of Interest

Pursuant to Article 2, Paragraph 1, the United States will timely file a Statement of Interest and accompanying formal foreign policy statement of the Secretary of State and Declaration of Deputy Treasury Secretary Stuart E. Eizenstat in all pending and future cases, regardless of whether the plaintiff(s) consent(s) to dismissal, in which the United States is notified that a claim has been asserted against German companies arising from the National Socialist era and World War II.

The Statement of Interest will make the following points:

1. As indicated by his letter of December 13, 1999, the President of the United States has concluded that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II, including without limitation those relating to slave and forced labor, aryanization, medical experimentation, children's homes/Kinderheim, other cases of personal injury, and damage to or loss of property, including banking assets and insurance policies.
2. Accordingly, the United States believes that all asserted claims should be pursued (or in the event Foundation funds have been exhausted, should timely have been pursued) through the Foundation instead of the courts.
3. As the President said in his letter of December 13, 1999, dismissal of the lawsuit, which touches on the foreign policy interests of the United States, would be in the foreign policy interests of the United States. The United States will recommend dismissal on any valid legal ground (which, under the U.S. system of jurisprudence, will be for the U.S. courts to determine). The United States will explain that, in the context of the Foundation, it is in the enduring and high interest of the United States to support efforts to achieve dismissal of all National Socialist and World War II era cases against German companies. The United States will explain fully its

foreign policy interests in achieving dismissal, as set forth below.

4. The United States' interests include the interest in a fair and prompt resolution of the issues involved in these lawsuits to bring some measure of justice to the victims of the National Socialist era and World War II in their lifetimes; the interest in the furtherance of the close cooperation this country has with our important European ally and economic partner, Germany; the interest in maintaining good relations with Israel and other Western, Central, and Eastern European nations, from which many of those who suffered during the National Socialist era and World War II come; and the interest in achieving legal peace for asserted claims against German companies arising from their involvement in the National Socialist era and World War II.
5. The Foundation is a fulfillment of a half-century effort to complete the task of bringing justice to victims of the Holocaust and victims of National Socialist persecution. It complements significant prior German compensation, restitution, and pension programs for acts arising out of the National Socialist era and World War II. For the last 55 years, the United States has sought to work with Germany to address the consequences of the National Socialist era and World War II through political and governmental acts between the United States and Germany.
6. The participation in the Foundation not only by the German Government and German companies that existed during the National Socialist era, but also by German companies that did not exist during the National Socialist

era, allows comprehensive coverage of slave and forced laborers and other victims.

7. Plaintiffs in these cases face numerous legal hurdles, including, without limitation, justiciability, international comity, statutes of limitation, jurisdictional issues, forum non conveniens, difficulties of proof, and certification of a class of heirs. The United States takes no position here on the merits of the legal claims or arguments advanced by plaintiffs or defendants. The United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal, but will reinforce the point that U.S. policy interests favor dismissal on any valid legal ground.
8. The Foundation is fair and equitable, based on: (a) the advancing age of the plaintiffs, their need for a speedy, non-bureaucratic resolution, and the desirability of expending available funds on victims rather than litigation; (b) the Foundation's level of funding, allocation of its funds, payment system, and eligibility criteria; (c) the difficult legal hurdles faced by plaintiffs and the uncertainty of their litigation prospects; and (d) in light of the particular difficulties presented by the asserted claims of heirs, the programs to benefit heirs and others in the Future Fund.
9. The structure and operation of the Foundation will assure (or has assured) swift, impartial, dignified, and enforceable payments; appropriately extensive publicity has been given concerning its existence, its objectives, and the availability of funds; and the

Foundation's operation is open and accountable.

Supreme Court, U.S.
FILED
AUG - 5 2003
OFFICE OF THE CLERK

(4) (5)

Nos. 02-1776, 02-1784

IN THE

Supreme Court of the United States

LESTER I. TENNEY, ET AL.,
Petitioners,
v.
MITSUI & CO., LTD., ET AL.,
Respondents.

ALBERTO SALDAJENO, ET AL.,
Petitioners,
v.
ISHIHARA SANGYO KAISHA LTD., ET AL.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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66 pp

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QUESTIONS PRESENTED

The decision below in these related petitions (Nos. 02-1776, 02-1784) held that California Code of Civil Procedure § 354.6 is preempted by the foreign affairs power of the federal government. These petitions ask this Court to resolve the following questions related to that decision:

1. Whether the decision is correct.

2. Whether the multilateral Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169 ("Treaty") prohibits these private causes of action against private Japanese companies.

3. Whether the Treaty violates international law by waiving the claims at issue in certain of these cases, given that they involve allegations of wartime forced labor.

4. Whether the court below properly decided a question of state law that the court noted "did not affect the outcome" of the case.

5. Whether there is removal jurisdiction over certain of these cases.

Rule 29.6 Corporate Disclosure Statement

Ishihara Corporation (U.S.A.)'s ultimate parent corporation is Ishihara Sangyo Kaisha, Ltd., and no other publicly traded company owns 10% or more of its stock.

Ishihara Sangyo Kaisha, Ltd. does not have any parent companies. Mitsui & Co, Ltd. is the only publicly held company that owns 10% or more of its stock.

ISK Americas Incorporated is a subsidiary of Ishihara Sangyo Kaisha, Ltd. No other publicly held company owns 10% or more of its stock.

Mitsui Mining Co., Ltd. is a Japanese public company listed on the Tokyo Stock Exchange. No publicly held company owns 10% or more of its stock.

Mitsui Mining USA, Inc. is a 100% subsidiary of Mitsui Mining Co., Ltd.

Mitsubishi Corporation is a public company listed on the Tokyo Stock Exchange. No publicly held company owns 10% or more of the outstanding stock of Mitsubishi Corporation. Mitsubishi International Corporation is a wholly-owned subsidiary of Mitsubishi Corporation.

Mitsubishi Heavy Industries, Ltd. is a Japanese public company and is listed on the Tokyo Stock Exchange. No publicly held company owns 10% or more of its stock. Mitsubishi Heavy Industries America, Inc., is a wholly-owned subsidiary of Mitsubishi Heavy Industries, Ltd.

Mitsubishi Materials Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

Mitsubishi Materials U.S.A. Corporation's parent corporation is Mitsubishi Materials Corporation, and no other publicly held company owns 10% of Mitsubishi Material U.S.A. Corporation's stock or more.

Mitsui & Co., Ltd. is a public company listed on the Tokyo Stock Exchange. No publicly held company owns 10% or more of the outstanding stock of Mitsui & Co., Ltd. Mitsui & Co. (U.S.A.), Inc. is a wholly-owned subsidiary of Mitsui & Co., Ltd.

Nippon Steel Corporation is a Japanese public company, listed on the Tokyo Stock Exchange. No publicly held company owns 10% or more of its stock. Nippon Steel U.S.A., Inc. is a wholly-owned subsidiary of Nippon Steel Corporation.

Nippon Steel Trading Co., Ltd. is a Japanese public company. Nippon Steel Corporation and Mitsui & Co., Ltd. are the only publicly held companies that own 10% or more of its stock.

Nippon Steel Trading America, Inc., is a wholly-owned subsidiary of Nippon Steel Trading Co., Ltd.

Taiheiyo Cement Corporation is a Japanese business association listed on the Tokyo Stock Exchange. No publicly held company owns 10% or more of its stock. Taiheiyo Cement U.S.A., Inc. is a wholly-owned subsidiary of Taiheiyo Cement Corporation.

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BRIEF OF RESPONDENTS IN OPPOSITION

Petitioners in these related cases (Nos. 02-1776, 02-1784) offer no plausible reason why this Court should review the decision below. The judgment of the U.S. Court of Appeals for the Ninth Circuit correctly holds that a California statute creating a cause of action for World War II era reparations claims – section 354.6 of the California Code of Civil Procedure – is preempted by the core federal power to make and resolve war. The United States exercised this power in the multilateral Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169 ("Treaty") (02-1776 Pet. App. 87a), which explicitly precludes the claims asserted by petitioners. The court of appeals' ruling is supported by the *amicus curiae* position of the United States below.[1]

Petitioners do not contend that there is any conflict between the ruling below and any decision of this Court. Nor do they identify any conflict among the federal courts of appeals or state courts of last resort with respect to any question addressed by the court below. Indeed, the petitions are effectively moot. Shortly after the petitions were filed, this Court issued its decision in *American Insurance Association v. Garamendi*, 123 S. Ct. 2374 (2003). In circumstances where the state law intrusion into the federal government's exclusive foreign affairs power was less obvious than it is here, *Garamendi* held another California statute regulating

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[1] The United States filed a Statement of Interest in the district court below, advocating dismissal of petitioners' claims on foreign relations grounds. *See* Statement of Interest of the United States of America ("Statement of Interest") (SER 338-75). "SER" refers to the Supplemental Excerpts of the Record filed jointly in the Ninth Circuit by respondents in the cases brought by each of the petitioners here. The United States filed an *amicus curiae* brief in the court of appeals reaffirming its view that section 354.6 impermissibly interferes with foreign relations and is preempted by federal law. *See* Brief for *Amicus Curiae* The United States of America, Nos. 01-17115 *et al.* (9th Cir. June 6, 2002).

World War II claims to be preempted by the foreign affairs power of the federal government. *Garamendi* confirms the court of appeals' conclusion that the statute at issue in these cases is preempted. The petitions should be denied.

OPINIONS BELOW

The petition in No. 02-1776 fails to note that the district court opinion included in its appendix, 02-1776 Pet. App. 69a, only applies to petitioners in Nos. 01-17115, 01-17124, 01-17134, 01-17155, 01-17185, 01-17195, 01-17252, and 01-17499.[2] The petition properly reflects that this opinion is reported at 114 F. Supp. 2d 939. With respect to the remaining POW petitioners (in Nos. 01-17116, 01-17123, and 01-17157), the opinion of the district court is unreported and is attached in the appendix hereto. App. 1a-6a.

The petition in No. 02-1784 correctly observes that the relevant opinion of the district court is reported at 164 F. Supp. 2d 1153.[3]

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[2] The following cases are before the Court as part of this petition: *Hutchison v. Mitsubishi Materials Corp.*, No. 01-17115; *Tenney v. Mitsui & Co., Ltd.*, No. 01-17116; *Rubenstein v. Ishihara Sangyo Kaisha, Ltd.*, No. 01-17123; *Heimbuch v. Ishihara Sangyo Kaisha, Ltd.*, No. 01-17124; *Solis v. Nippon Steel Corp.*, No. 01-17134; *Corre v. Mitsui & Co., Ltd.*, No. 01-17155; *Dunn v. Nippon Steel Corp.*, No. 01-17157; *Eneriz v. Mitsui & Co., Ltd.*, No. 01-17185; *Poole v. Nippon Steel Corp.*, No. 01-17195; *Alfano v. Mitsui & Co. (USA), Inc.*, No. 01-17252; and *Price v. Mitsubishi Corp.*, No. 01-17499. Six other cases involving U.S. or Allied POWs with claims under section 354.6 – *King v. Nippon Steel Corp.*, No. 01-17160; *Levenberg v. Nippon Sharyo Ltd.*, No. 01-17189; *Wheeler v. Mitsui & Co., Ltd.*, No. 01-17210; *Mente v. Mitsui & Co., Ltd.*, No. 01-17230; *Terrence v. Mitsui & Co., Ltd.*, No. 01-17260; and *Titherington v. Japan Energy Corp.*, No. 01-17265 – were also consolidated at the district court and the court of appeals, but the plaintiffs in those cases did not join the petition here.

[3] The following cases are part of this petition: *Llanza v. Mitsui & Co. (U.S.A.)*, No. 01-17172; *Saldajeno v. Ishihara Sangyo Kaisha, Ltd.*, No. 01-17176; and *Santo Domingo v. Ishihara Sangyo Kaisha, Ltd.*, No. 01-

PERTINENT CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES

The following provisions of the United States Constitution are included in the appendix attached hereto:

Article I, § 8, cls. 1, 10-14 (App. 21a).

Article I, § 10, cls. 1, 3 (App. 22a).

Article II, § 2, cls. 1, 2 (App. 22a-23a).

The 1951 Treaty of Peace with Japan is included in the petitioner's appendix in No. 02-1776 (02-1776 Pet. App. 87a-121a).

Relevant excerpts of the War Claims Act of 1948, as amended and codified in 50 U.S.C. app. §§ 2001 et seq., are included in the appendix attached hereto (App. 7a-20a).

Section 354.6 of the California Code of Civil Procedure is set forth in full in the Ninth Circuit's opinion, 02-1776 Pet. App. 42a-43a, and in the petitioners' appendix in No. 02-1776 (*id.* at 122a).

STATEMENT OF THE CASE

Petitioners in No. 02-1776, and the putative classes they claim to represent, are United States service members, or their heirs, who claim they were subjected to forced labor during the time they were held as prisoners of war ("POWs") by Japan during World War II. Petitioners in No. 02-1784, and the putative classes they claim to represent, are citizens and residents of the Philippines during World War II (or

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17177. Another case involving Filipino claims – *Resus v. Mitsui & Co., Ltd.*, No. 01-17204 – was also consolidated at the district court and the court of appeals, but the plaintiffs in that case did not join this petition.

their heirs) who claim to have been subjected to forced labor during the Japanese occupation.[4]

A. Background

Beginning in 1999, petitioners filed lawsuits (ultimately combined in a single multidistrict litigation proceeding) seeking reparations for the labor they allegedly were forced to perform for Japanese corporations while held as POWs by the Japanese military, or as internees in the Philippines. The purported authority for these lawsuits, brought almost sixty years after the alleged underlying acts occurred, is section 354.6 of the California Code of Civil Procedure.

Section 354.6 permits any "Second World War slave labor victim . . . or Second World War forced labor victim" to bring suit "to recover compensation for labor performed" during World War II against "any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate." Cal. Civ. Proc. Code § 354.6(b) (2003). The statute defines "compensation" as "the present value of wages and benefits that individuals should have been paid and damages for injuries sustained." *Id.* § 354.6(a)(3). The statute also provides that an action brought under it will be timely if commenced on or before December 31, 2010. *See id.* § 354.6(c).

This statute was enacted nearly fifty years after the United States and forty-six other Allied Powers formally ended the war in the Pacific by signing the multilateral Treaty, *supra*, 3 U.S.T. 3169-3328 (02-1776 Pet. App. 87a-

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[4] All references to "POW petitioners" are to the petitioners in No. 02-1776. All references to "Filipino petitioners" are to the petitioners in No. 02-1784. No classes have been certified in any of petitioners' cases; putative class members allegedly number in the "thousands." *E.g.*, *Alfano* Complaint (SER 124); *Saldajeno* Complaint (ER tab 2).

121a).[5] Under the Treaty, Japan agreed to pay the Allied Powers approximately $4 billion in reparations from various sources – primarily from the assets of Japanese nationals, including Japanese companies, located in Allied and neutral nations. *See* U. S. Dept. of State, Foreign Relations of the United States, 1951, Vol. VI: Asia and the Pacific, Pt. 1, Washington, D.C.: U.S. G.P.O. (1977) (SER 473). While the Treaty "recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war," the Treaty also recognized that the resources of Japan were not sufficient "to make complete reparation for all such damage and suffering." Treaty, *supra*, art. 14(a), at 3180 (02-1776 Pet. App. 97a). Accordingly, except for the reparations explicitly provided for in the Treaty, the Allied Powers agreed to "waive all reparations claims" as well as "other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." *Id.* art. 14(b), at 3183 (02-1776 Pet. App. 99a). The Treaty does not create – expressly or otherwise – a private right of action against Japan or its nationals, nor does it authorize any State of the United States to create such a right.

The decision to limit the amount of reparations paid by Japan, and to waive all other war-related claims, was dictated by a number of foreign policy concerns. *See generally* Statement of Interest, *supra*, at 1-2 (SER 338-39). At the time the Treaty was negotiated, the Korean War was underway, communism had taken hold of China, and Soviet expansionism was viewed as a worldwide threat. *See* Japanese Peace Treaty Negotiations, Mar. 9, 1951, printed in Execu-

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[5] The Philippines was one of the "Allied Powers" under the Treaty. *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1153, 1157 (N.D. Cal. 2001). The Philippines ratified the Treaty on July 23, 1956, and deposited the ratification with the United States pursuant to Article 24 of the Treaty. *Id.*

tive Sessions of the Senate Foreign Relations Comm. (Historical Series) vol. III, Part I, 82nd Cong., 1st Sess., 1951, at 261 (1976) ("Japanese Peace Treaty Negotiations") (SER 427). This political reality caused the United States to view an economically stable, anti-communist Japan as essential to U.S. interests in the Pacific region. *See* Statement of Interest, *supra*, at 4 (citing Japanese Peace Treaty Negotiations, *supra*, at 261) (SER 341). Japan would be unable to be an effective Cold War ally if its economy was stifled by the ongoing burden of unresolved war claims. *See id.* at 4, 5 (citing Japanese Peace Treaty Negotiations, *supra*, at 266-67) (SER 341-42).

The United States also wanted to avoid repeating the mistakes of the Versailles Treaty, which imposed crushing reparations on Germany at the end of World War I, and which many considered to be one of the root causes of World War II. *See* Statement of Interest, *supra*, at 2 (SER 339). If the Treaty had "validated, or kept contingently alive, monetary reparations claims against Japan, her ordinary commercial credit would vanish, the incentive of her people would be destroyed and they would sink into a misery of body and spirit which would make them easy prey to exploitation." U.S. Dept. of State, Record of Proceedings of the Conference for the Conclusion and Signature of the Treaty of Peace with Japan 82-83 (1951) (SER 391).

Finally, the United States government concluded that its assumption of sole responsibility for Japan's recovery following the war would mean that any substantial payment of war-related claims would ultimately become the responsibility of U.S. taxpayers. *See* Statement of Interest, *supra*, at 4-5 (citing Japanese Peace Treaty Negotiations at 266-67) (SER 341-42). For all these reasons, the United States and its Allies agreed in the Treaty to waive all claims against Japan and its nationals in exchange for the forfeiture by Japan and its nationals of their foreign assets.

The Senate Foreign Relations Committee report recommending approval of the Treaty notes these concerns:

> Obviously insistence upon the payment of reparations in any proportion commensurate with the claims of the injured countries and their nationals would wreck Japan's economy, dissipate any credit that it may possess at present, destroy the initiative of its people, and create misery and chaos in which the seeds of discontent and communism would flourish. In short, [it] would be contrary to the basic purposes and policy of . . . the United States . . . .

Japanese Peace Treaty and Other Treaties Relating to Security in the Pacific, S. Rep. No. 82-2, at 2 (1952) (SER 407). The Committee recognized that the Treaty did not "give a direct right of return to individual claimants except in the case of those having property in Japan." *Id.* at 13 (SER 408). Rather, the Committee endorsed the position of the State Department that "United States nationals, whose claims are not covered by the treaty provisions . . . must look for relief to the Congress of the United States." *Id.* at 14 (SER 409).[6]

Congress decided to use the reparations it received from Japan under the Treaty – the confiscated assets of Japanese companies, other Japanese nationals, and the Japanese government located in the United States – to compensate U.S.

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[6] Article 14(b) was hotly debated in Congress, and a reservation was proposed that would have preserved individual claims by providing that "nothing contained in this Treaty shall be construed to abrogate the . . . just and proper claims of private citizens of the United States." Statement of Interest, *supra*, at 9 (quoting 98 Cong. Rec. 2365, 2567-71 (1952)) (SER 346). That reservation was deemed to be "in direct conflict with Article 14(b)," was defeated, and the Treaty ratified, unchanged. *Id.* (quoting Memorandum to The Secretary of State from Adrian S. Fisher (the Legal Adviser), Mar. 19, 1952, at 4, 5) (SER 346).

nationals who were held as POWs during the war.[7] Accordingly, it established in the War Claims Act of 1948, 50 U.S.C. app. §§ 2001 et seq. (App. 7a-20a), a federal claims mechanism by which former POWs, including these POW petitioners, could seek a share of the reparations received from Japan. Recognizing "that the question of war claims ... is too complex to be approached by the Congress on a piecemeal basis and that the subject in its entirety must be studied thoroughly before any intelligent action can be taken," H.R. Rep. No. 801-976, at 4 (1947) (SER 490), Congress charged the War Claims Commission with the adoption of uniform standards and procedures for handling war claims. 50 U.S.C. app. § 2007 (App. 18a-19a); *see also* 94 Cong. Rec. 567 (1948) (SER 504). The War Claims Act required POWs to submit their claims to the federal War Claims Commission, which was to make a final decision with respect to each claim. *See* 50 U.S.C. app. § 2010 (App 19a-20a).

The War Claims Act was intended to be the exclusive remedy for the payment of reparations to POWs. The Act does not permit any private lawsuits, and the final agency decision constitutes the only means for POWs to obtain compensation. In fact, a proposal that would have allowed federal courts to adjudicate war compensation claims was rejected because of the complexity of the issues and the need to have the claims "classified by experts who are qualified to do so" in order to "get some rationality out of this situation

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[7] The Treaty did not specify how the Allied Powers were to distribute the reparations they received from Japan. While the United States established claims mechanisms for former POWs to receive a share of the reparations, it was "the responsibility of each government to provide such compensation to the persons enjoying its protection as it may determine to be equitable out of reparations received from Japan or from other sources." Japanese Peace Treaty and Other Treaties Relating to Security in the Pacific, 82d Cong. 147 (1952) (SER 465); *see also* S. Rep. No. 82-2, at 13 (SER 408).

. . . [and] to determine the categories of claims that should be allowed." 94 Cong. Rec. 564 (1948) (SER 501).

In 1997, dissatisfied with the federal government's policies regarding the appropriate level and means of compensating victims of World War II, the California legislature launched its own efforts to provide a state law remedy for wartime injuries. One element of California's reparations legislation was section 354.6, which, as discussed above, *supra* p. 4, provides a private cause of action for "Second World War" forced and slave labor victims, including former POWs such as certain of the petitioners. Cal. Civ. Proc. Code § 354.6(b).

California also provided a private cause of action for any Holocaust victim, heir or beneficiary who "has a claim arising out of an [unpaid] insurance policy or policies purchased or in effect in Europe before 1945." Cal. Civ. Proc. Code § 354.5(b) (2003). Section 354.5 was complemented by the Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"), Cal. Ins. Code Ann. §§ 13800-13807, which required insurance companies licensed to do business in California to disclose information relating to unpaid policies issued either by themselves or affiliated companies in Europe between 1920 and 1945. This Court held the HVIRA to be preempted by the foreign affairs power of the federal government in *Garamendi*, 123 S. Ct. at 2379.

B. Proceedings in the District Courts

Shortly after section 354.6 was enacted, petitioners brought these actions in California state court. Each action, as well as several others not part of these petitions, was removed to federal court. Upon removal, some of the petitioners unsuccessfully sought remand.

For example, in *Tenney*, No. 01-17116, the district court found removal was proper because federal question jurisdic-

tion exists under the complete preemption doctrine. The district court explained that Congress's intent in ratifying the Treaty was to "preempt other laws, including state laws . . . relating to losses suffered by individuals during WWII," and to supplant them with a "trust fund for the payment of war claims as provided by the War Claims Act of 1948." SER 252-53. The district courts in other of the related cases found jurisdiction on additional grounds, including the federal common law of foreign relations. *See, e.g.*, *Poole*, No. 01-17195; *Solis*, No. 01-17134.

Eventually, the Judicial Panel on Multidistrict Litigation transferred petitioners' cases to the U.S. District Court for the Northern District of California for coordinated pretrial proceedings, along with fourteen other actions by U.S., Allied, Filipino, Korean, and Chinese plaintiffs pursuing similar claims under section 354.6.

In the Northern District of California, respondents initially moved to dismiss twelve actions by U.S. and Allied POWs. Respondents were supported in the district court by the United States, which filed a Statement of Interest urging dismissal on the ground that section 354.6 is preempted by the foreign affairs power of the federal government. SER 328-75. In opposing dismissal, petitioners again argued that the district court lacked subject matter jurisdiction over their claims. In a single opinion, the district court reaffirmed that it had subject matter jurisdiction because each of the actions asserted claims implicating the common law of foreign relations. *In re World War II Era Japanese Forced Labor Litig.*, 114 F. Supp. 2d 939, 942-43 (N.D. Cal. 2000). The district court then concluded that all of the claims by U.S. POWs were barred by the Treaty and the War Claims Act. Accordingly, the court dismissed the complaints. *Id.* at 944-49. In a subsequent order, the court dismissed three later-transferred POW cases on the same grounds. App. 1a-6a.

The respondents in the Filipino cases also moved to dismiss. The district court dismissed the Filipino complaints on the ground that the claims were all barred by the Treaty. *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d at 1157. Unlike the POW petitioners, the Filipino petitioners did not contest jurisdiction below. The district court subsequently dismissed the remaining related actions by Korean and Chinese plaintiffs.

C. The Court of Appeals Decision

The dismissals of all twenty-eight actions were appealed to the U. S. Court of Appeals for the Ninth Circuit. The United States filed an *amicus curiae* brief and appeared at oral argument to urge affirmance of the district court's ruling. In a single opinion, the court of appeals affirmed the dismissal of all actions.[8]

The court of appeals began by noting that section 354.6 "create[s] a specific cause of action for persons subjected to slave labor by the Nazis and their allies and sympathizers." 324 F.3d at 707. The court then analyzed whether section 354.6 unconstitutionally interferes with the foreign affairs power of the federal government, in particular, "the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims." *Id.* at 712. The court noted that of the eleven clauses of the Constitution granting foreign affairs power to the President and Congress, seven "concern preparing for war, declaring war, waging war, or settling war." *Id.* at 711; *see* U.S. Const., art. II, § 2, cls. 1, 2 (App. 22a-23a); art. I, § 8, cls. 1, 11-14 (App. 21a). The Constitution also expressly limits the States' foreign af-

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[8] The twenty-eight cases dismissed by the Northern District of California were consolidated on appeal, along with another case based on section 354.6, *Deutsch v. Turner*, No. 00-56673. Of the consolidated cases, several are the subjects of separate petitions to this Court. *See Kim v. Mitsui & Co. Ltd.*, No. 02-1773; *Ma v. Kajima Corp.*, No. 02-1778.

fairs powers, particularly in the area of war. *See* U.S. Const., art. I, § 8, cl. 10 (App. 21a). Emphasizing that "it is clear that matters concerning war are part of the inner core of [the foreign relations] power," 324 F.3d at 711, the court concluded that "[m]atters related to war are for the federal government alone to address," *id.* at 712.

In addition, the court of appeals noted that the federal government had already exercised its exclusive authority to resolve World War II and any claims arising out of it. The United States had signed the Treaty with Japan, which did not "create[] – explicitly or implicitly – a private right of action against Japan or its nationals." 324 F.3d at 714. In the absence of some specific action of the federal government authorizing states to exercise foreign affairs powers, California had no power to modify the federal government's resolution of the war. *Id.* With regard to the POW petitioners in particular, the court noted that their claims "were addressed by the federal government" in the War Claims Act, which "conceived of no private right of action against . . . Japanese entities." *Id.* at 714-15. The court of appeals accordingly held section 354.6 unconstitutional. *Id.* at 714-16.

After eliminating section 354.6 as a basis for petitioners' lawsuits, the court considered all of the other claims and concluded they were all time-barred. 324 F.3d at 716. Finally, the court of appeals declined to revisit the argument of some petitioners that federal jurisdiction was lacking. The court did note that diversity jurisdiction existed in some cases, including *Dunn v. Nippon Steel Corp.*, No. 01-17157. *See* 324 F.3d at 718.

Petitioners requested rehearing and rehearing en banc, which were unanimously denied. Following this Court's decision in *Garamendi*, petitioners in the related case *Ma v. Kajima Corp.*, No. 02-1778, filed for reconsideration. The

Ninth Circuit denied that motion at the same time it issued the mandate on July 30.

REASONS FOR DENYING THE PETITION

I. THERE IS NO BASIS FOR REVIEW OF THE MERITS OF THE DECISION BELOW

The petitions in Nos. 02-1776 and 02-1784 raise a number of related questions challenging the merits of the court of appeals' conclusion that section 354.6 unconstitutionally interferes with the foreign affairs power of the federal government. Those questions were effectively addressed and resolved in this Court's recent *Garamendi* decision. Furthermore, the decision below is independently justified on at least two alternate grounds: section 354.6 is unconstitutional because it violates due process, and the political question doctrine dictates that these cases are not justiciable. The existence of these alternate grounds for affirmance of the opinion below also counsels against review.

A. The Court of Appeals Properly Held Section 354.6 Interferes With The Foreign Policy Choices Reflected In The Treaty of Peace With Japan And The War Claims Act

Petitioners argue that this Court should review whether the court of appeals mistakenly interpreted the Treaty as prohibiting the assertion of private causes of action by individuals against "private Japanese companies that enslaved them." 02-1776 Pet. at i; *see also* 02-1784 Pet. at 11 ("private Japanese corporations for their profit-making activities"). This question is inappropriate for review in light of *Garamendi*.[9]

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[9] The POW petitioners mistakenly characterize the decision below as necessarily resting on a conflict between the terms of the Treaty and section 354.6. 02-1776 Pet. at 12. In fact, the court of appeals did not rest its decision on any particular reading of the Treaty, but rather on a broader holding that "[m]atters related to war are for the federal govern-

Garamendi directly undercuts petitioners' fundamental assertion that their claims are private, not governmental, and therefore "neither are, nor are similar to, reparations claims." 02-1776 Pet. at 21; 02-1784 Pet. at 12. A similar argument was made by the State of California regarding the private insurance claims at issue in *Garamendi*. This Court rejected that distinction, noting that the frustration of private insurance claims "fell within the subject of reparations, which became a principal object of Allied diplomacy soon after the war." 123 S. Ct. at 2380. More so than private insurance claims, claims by POWs and others held captive by the enemy during the war are quintessential reparations claims to be resolved by governments at war's end. The Treaty fully and finally resolved those claims. Treaty, *supra*, art. 14(b), 3 U.S.T. at 3183 (02-1776 Pet. App. 99a).

Petitioners similarly assert that "no treaty in the history of this Republic has ever been held by this Court to preclude the assertion of private rights of action by private citizens against foreign non-government defendants." 02-1776 Pet. at i. But *Garamendi* expressly held that the United States may properly resolve claims against foreign corporations as well as foreign governments:

> [T]he distinction does not matter. Historically, wartime claims against even nominally private entities have become issues in international diplomacy . . . . Untangling government policy from private initiative during war time is often so hard that diplomatic ac-

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ment alone to address." 324 F.3d at 712. While noting that neither the Treaty nor the War Claims Act authorized any private cause of action against Japan or its nationals, the court of appeals held that "section 354.6 is impermissible because it intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims." *Id.* at 712. According to the court of appeals, the real issue is the "lack of state power" to provide its own resolution of the war. *Id.* at 715.

> tion settling claims against private parties may well be just as essential in the aftermath of hostilities as diplomacy to settle claims against foreign governments.

123 S. Ct. at 2387 (footnote omitted).

Petitioners' other arguments regarding the proper interpretation of the Treaty have been consistently rejected by the United States, *see* Statement of Interest, *supra* (SER 328-75), and are clearly without merit. Petitioners offer no rationale for this Court to accept review of these questions. Petitioners are wrong that different language used in Article 19 of the Treaty to waive claims by Japan and its nationals against the United States and its nationals suggests that Article 14(b) does not waive the claims here. 02-1776 Pet. at Part C.1.a; 02-1784 Pet. at 14-21. There is nothing ambiguous about the scope of the waiver in Article 14. As *Garamendi* made clear, the concept of "reparations" includes the types of claims asserted by petitioners, and Article 14 waives those claims, along with all other claims arising in the course of the prosecution of the war.[10] The distinctions in phrasing between Articles 14(b) and Article 19(a) reflect the different positions of the Allied Powers and Japan – which, for example, had to waive claims arising out of the post-war occupation. Petitioners' reading ignores both the plain language of Article 14(b) and the foreign policy goal underlying the Treaty – the full and final resolution of wartime claims against Japan.

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[10] The Filipino petitioners argue here, as they did below, that Article 14(b) cannot apply to their claims because their forced labor in the occupied Philippines, which was ruled by the Japanese military, did not occur "in the course of the prosecution of the war." 02-1784 Pet. at 15-20. The district court correctly rejected this argument based on its careful analysis of allegations made in the Filipino petitioners' own complaints, *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d at 1157-58, finding the argument "seriously disingenuous." *Id.* at 1157.

The POW petitioners are also wrong to assert that the waiver of their claims by Article 14(b) was revoked by subsequent treaties between Japan and other countries. 02-1776 Pet. at Part C.2. In particular, they invoke Article 26, which provides that "[s]hould Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the *parties* to the present Treaty." Treaty, *supra*, art. 26, 3 U.S.T. 3169, 3190-91 (emphasis added) (02-1776 Pet. App. 106a). Even if it could be assumed that any other nation was ever granted a "greater advantage" than that provided to the United States with respect to Article 14(b)'s waiver, it is the United States as a *party* to the treaty who has the right to invoke that clause, and the United States has never done so, nor has any other Treaty party. As the court of appeals correctly held, petitioners cannot invoke this provision, as they were not parties to the treaty. 324 F.3d at 714 n.13.

The Filipino petitioners argue that because their claims arise from violation of "*jus cogens*" norms, the claims could not be waived by any treaty.[11] 02-1784 Pet. at Part III. This question is not worthy of this Court's attention. The Filipino petitioners point to no conflict among the circuits, no conflict with any holding of this Court, and no conflict with any holding of a state court of last resort.[12] Indeed, the only other court of appeals to interpret the Treaty has held that

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[11] The POW petitioners made similar arguments below, but abandoned them in their petition to this Court.

[12] In fact, the Filipino petitioners have twisted the *jus cogens* argument beyond recognition. There is no *jus cogens* right to the remedy they seek – civil litigation in tort and quasi-contract. The Treaty acknowledged that Japan owed compensation to the Allies for war-related injuries and wrongs, including forced labor, and required Japan to pay reparations. As this Court recognized in *Garamendi*, for the "last half century" the resolution of such claims has been the subject of diplomacy and treaties. 123 S. Ct. at 2390.

claims such as plaintiffs' could be and were in fact settled and waived. *See Joo v. Japan*, 332 F.3d 679, 687 (D.C. Cir. 2003) (affirming dismissal of claims by comfort women from the Phillipines, Korea, China, and Taiwan because the Treaty created "a settled expectation, left undisturbed by the Congress, that Japan would not face suit in the courts of the United States for its actions during World War II").

Indeed, the Filipino petitioners' position would undermine the ability of the United States and other nations to resolve wars and establish peace through the settlement of claims, and would require the abrogation of the Treaty and other international agreements that resolved World War II. Petitioners' argument is impossible to reconcile with this Court's decision in *Garamendi* affirming the settlement of the wartime claims of individuals as a "traditional subject matter of foreign policy." 123 S. Ct. at 2390; *see also Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981); *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

Finally, without citing any authority, the Filipino petitioners argue that the court below erred in holding their non-section 354.6 claims to be time-barred.[13] 02-1784 Pet. at 27. However, petitioners base this argument on the dual assumption that section 354.6 is constitutional, and that it revives and extends the statute of limitations on their remaining claims. Both assumptions are wrong. As noted herein, section 354.6 is unconstitutional, even if it is viewed as purely procedural. Moreover, by its own terms, section 354.6(c) only extends the statute of limitations on "action[s] brought

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[13] Relying on the same facts underlying their section 354.6 causes of action, petitioners alleged a variety of additional claims (including accounting, unjust enrichment, constructive trust, intentional infliction of emotional distress, conversion, quantum meruit, and unfair business practices in violation of Cal. Bus. & Prof. Code §§ 17200 et seq.). The POW petitioners do not challenge the dismissal of these claims.

under this section" – not on other actions. Petitioners do not identify any California statute of limitations, apart from section 354.6(c), that permits sixty-year-old claims.

For all the foregoing reasons, petitioners have raised no issue that would warrant review of whether the Treaty preempts the assertion of their claims.

B. The Court of Appeals Did Not Inappropriately Resolve A Question of State Law

The POW petitioners argue that the court of appeals erred in holding that section 354.6 was a substantive statute creating a cause of action, rather than a purely procedural statute reviving and extending the statute of limitations on sixty-year-old claims. 02-1776 Pet. at 11. This issue does not merit review, because the court of appeals made clear that its decision did "not depend on [its] conclusion that section 354.6 is substantive law." 324 F.3d at 708. The court noted that

> [w]hether substantive or procedural, section 354.6 creates a special rule that applies only to a newly defined class of tort actions – actions brought by Second World War slave labor victims against the entities that enslaved them. This new rule profoundly alters the likelihood that such actions will succeed, by not only extending the statute of limitations for claims that were timely when the statute took effect (although we doubt that any such claims existed), but, far more important, by reviving claims that were already time-barred.

Id. Because the question whether section 354.6 is procedural or substantive "does not affect the outcome here," review is unwarranted. *Id.*

Even if the court of appeals' decision had turned on its characterization of section 354.6 as a substantive statute cre-

ating a private cause of action, review would still be unnecessary. Contrary to petitioners' assertion, this Court has expressly held that a federal appellate court may assess "how the highest court of a State would resolve a question of interpretation of State law." 02-1776 Pet. at i. *See, e.g.*, *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967) (noting that when there is no decision by a State's highest court, a federal court must apply what it "find[s] to be the state law after giving 'proper regard' to relevant rulings of other courts of the State").[14] Thus, the court of appeals' conclusion that section 354.6 creates a private cause of action was both appropriate and unremarkable.[15]

Review is particularly unwarranted in light of this Court's recent decision in *Garamendi*. In that case, the insurance statute at issue (the HVIRA) was nothing more than a reporting requirement. Nonetheless, this Court held that the HVIRA employed "'a different, state system of economic pressure'" that "undercut[ ]" the foreign policy choices made

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[14] The POW petitioners assert that the California Supreme Court will soon decide whether section 354.6 is substantive or procedural in a group of related World War II-era cases. 02-1776 Pet. at 6. In fact, the California Supreme Court stayed proceedings in those cases pending this Court's resolution of *Garamendi*. Given this Court's decision in *Garamendi*, the California Supreme Court should have no need to decide whether section 354.6 is substantive or procedural, since, as discussed above, no matter its proper interpretation, the statute is clearly preempted.

[15] Rejecting petitioners' argument that section 354.6 merely extended the statute of limitations, the court of appeals correctly noted that the statute provides that certain individuals "may bring an action." 324 F.3d at 707 (quoting *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 122 S. Ct. 1753, 1759 (2002), in which this Court noted that language in a statute providing that a party "may bring an action" "reads like the conferral of a private right of action"). In addition, the court of appeals noted that the statute "defines the class of plaintiffs who may sue under that cause of action, *see* § 354.6(a)(1), (2), sets the method for measuring damages, *see* § 354.6(a)(3), and establishes a special rule regarding liability of corporations affiliated with the wrong-doer *see* § 354.6(b)." 324 F.3d at 707.

by the President in resolving wartime claims. 123 S. Ct. at 2391 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 376 (2000)). The Court noted that the President had entered into an Executive Agreement reflecting a foreign policy decision to "encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions." *Garamendi*, 123 S. Ct. at 2390. California, however, undertook "a different tack of providing regulatory sanctions to compel disclosure and payment" that impermissibly interfered with the executive policy. *Id.* at 2391. Significantly, this Court referred to California's Civil Procedure Code section 354.5 – the sister act to section 354.6 – as "a new cause of action for Holocaust survivors." *Id.*

Whether section 354.6 is interpreted as creating a cause of action or as resurrecting a statute of limitations on existing causes of action, it is clearly more intrusive on federal foreign affairs than the HVIRA. Unlike the insurance claims in *Garamendi,* which were not resolved at the end of World War II, but were subject to a voluntary settlement process under a later Executive Agreement, petitioners' claims were explicitly settled and waived by the Treaty. And unlike the HVIRA, which on its face did not purport to facilitate the resolution of war claims, section 354.6 applies *only* to "Second World War" forced and slave labor victims, and creates (or at least resurrects) those precise war claims. Even more than the insurance regulation in *Garamendi*, section 354.6 interferes with a "traditional subject matter of foreign policy in which national, not state, interests are overriding, and which the National Government has addressed." *Garamendi*, 123 S. Ct. at 2390. It matters not whether the California Supreme Court one day interprets section 354.6 as substantive or procedural.

C. The Decision Below Is Independently Justified On Two Separate Bases

Although the court below did not need to reach several alternate arguments made by respondents, it could have reached the same outcome on at least two alternate theories. These alternate bases, too, indicate that review by this Court is not warranted.

First, applying California law to these types of claims would violate due process given the "weakness of the State's interest, against the backdrop of traditional state legislative subject matter." *Garamendi*, 123 S. Ct. at 2392. In *Garamendi*, the Court held that California's interest in assisting several thousand Holocaust survivors in the State could not displace "general standards for evaluating a State's claim to apply its forum law to a particular controversy or transaction." *Id.* at 2393 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 820 (1985)). In *Shutts*, the Court held that the State must have "'significant contact or significant aggregation of contacts' to the claims asserted" in order to ensure that the application of state law would not be "arbitrary or unfair." 472 U.S. at 821-22 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)). Here, the conduct at issue is wholly unconnected to California. Neither petitioners nor respondents, at the time of the events, could "reasonably have anticipated that their actions would later be judged" by California law. *Allstate*, 449 U.S. at 327 (Stevens, J., concurring).

Furthermore, whether section 354.6 is procedural or substantive in nature does not cure the due process violation. Even if the statute were interpreted as merely a procedural extension of the statue of limitations on claims against former enemy nationals, it would run afoul of the constitutional prohibition on retroactive legislation. *See Eastern Enters. v. Apfel*, 524 U.S. 498, 538-39 (1998) (Kennedy, J., concur-

ring) (legislation with retroactive effect is a particular concern for the courts and subject to distrust under due process jurisprudence); *cf. Stogner v. California*, 123 S. Ct. 2446, 2448 (2003) (invalidating California's retroactive extension of a criminal statute of limitations as a violation of the Ex Post Facto Clause). The court below, while not deciding the retroactivity issue, recognized that "[s]uch a revival of liability – even civil liability – is troubling and raises serious due process questions." 324 F.3d at 708.

Second, the political question doctrine renders the claims brought in these cases non-justiciable. The power to make war and to enter into treaties is committed solely to the political branches. *See* U.S. Const. art. I, § 8, cls. 11, 12, 14 and art. II, § 2 (App. 21a-23a). As discussed above, the negotiations culminating in the Treaty involved complex foreign policy considerations and compromises. Petitioners seek nothing less than a judicial reexamination of policy decisions made half a century ago, pursuant to which Japan became and continues to be a vital ally of the United States. Such a reexamination would undermine the policy choices of the political branches embodied in the Treaty, involve the courts in balancing competing foreign policy concerns, and potentially expose the United States and its nationals to claims from Japanese nationals injured during the war. Even if "judicially . . . manageable standards" existed to allow courts to resolve every injury resulting from a major world war, the separation of powers precludes such a judicial undertaking. *See Baker v. Carr*, 369 U.S. 186, 217 (1962).[16]

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[16] The court of appeals opined that no political question is raised "by the simple application of the requirements of a treaty to which the United States is a party." 324 F.3d at 713 n.11. With regard to petitioners' claims, however, it is not the interpretation of the Treaty that raises a political question, but rather petitioners' attempt to use the courts to undo the foreign policy decisions made by the President and Congress in the

II. FEDERAL SUBJECT MATTER JURISDICTION UNQUESTIONABLY EXISTS IN THESE CASES

In addition to challenging the court of appeals' decision on the merits, the POW petitioners argue that the federal courts lack jurisdiction over their claims because they are merely state law "wage claims." 02-1776 Pet. at 4. The Filipino petition raises no jurisdictional issues.[17]

The jurisdictional issue the POW petitioners raise is insubstantial and does not warrant review by this Court. First, petitioners cannot show that a determination of whether there was federal jurisdiction would change the decision on the merits, as there is undisputed jurisdiction in some of the consolidated cases. Second, petitioners have not shown, and cannot show, that any – let alone all – of the several grounds on which the various district courts found federal jurisdiction are ones on which the circuits are split, or are issues important enough to require this Court's intervention. Thus, under the Court's traditional criteria for granting certiorari, there is no reason for review of this issue. Finally, the POW petitioners' jurisdictional argument misconstrues both the nature of their own claims and the governing law. Under multiple rationales, federal jurisdiction unquestionably exists in these cases.

A. Diversity Jurisdiction Exists In At Least One Case

The court of appeals observed that in some of the actions, including one of the actions that is part of the petition in No. 02-1776, *Dunn v. Nippon Steel Corp., et al.*, No. 01-17157, there is diversity jurisdiction. 324 F.3d at 718. Petitioners

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aftermath of World War II. *See generally Garamendi*, 123 S. Ct. at 2386-87.

[17] Indeed, the Filipino petitioners affirmatively argued to the district court that federal subject matter jurisdiction was proper under the Alien Tort Claims Act, 28 U.S.C. § 1350. *See In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d at 1159.

do not and cannot challenge this ruling. Petitioners argue generally that "[t]he presence of California plaintiffs and defendants precludes federal jurisdiction based on diversity of citizenship." 02-1776 Pet. at 3 n.2. However, in *Dunn*, complete diversity exists, as the plaintiff is a citizen of California, and no defendant is a citizen of California. *See* 324 F.3d at 718. Thus, the lower courts unquestionably had jurisdiction to decide the issues raised in this Court.

B. The Treaty And The War Claims Act Completely Preempt Petitioners' Claims

Petitioners' efforts to divorce their claims from the wartime context in which they arose and to recharacterize them as simple state law wage claims does not survive this Court's decision in *Garamendi*. In that case, the State of California argued that the HVIRA was merely a "consumer protection" regulation designed to inform California residents which insurers failed to pay claims. 123 S. Ct. at 2392. The Court saw through this argument and held that the HVIRA was actually designed to assist "several thousand Holocaust survivors" in pursuing reparations claims. *Id.* at 2393. Noting that the resolution of "Holocaust-era insurance claims" was part of the federal government's ongoing diplomatic efforts to address the "issue of restitution for Nazi crimes," the Court held this area was a "traditional subject matter of foreign policy" that overrode state regulation. *Id.* at 2390. Where, as here, the POW petitioners' claims involve the powers of the federal government to make war and peace, and where the President and Congress have exercised their foreign affairs authority to resolve the claims of POWs exclusively through the Treaty and the War Claims Act, petitioners' purported state law claims are completely preempted, giving rise to federal jurisdiction.

Federal question jurisdiction exists as to each of the POW petitioners' actions because the Treaty and the War

Claims Act completely preempt World War II claims against Japan and its nationals. Where federal law completely preempts an area of state law, even complaints that purport to bring only state law claims are nonetheless "necessarily federal in character." *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987); *accord Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987) ("Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law.").

This Court recently explained that in determining whether Congress intended that a particular statute would completely preempt state laws on the same subject, it is appropriate to consider whether the statute concerns a subject the "special nature" of which requires "[u]niform rules . . . prescribing exclusive remedies" so as to assure "protection from 'possible unfriendly State legislation.'" *Beneficial Nat'l Bank v. Anderson*, 123 S. Ct. 2058, 2064 (2003) (quoting *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 412 (1874)).[18]

Under these principles, federal law completely preempts state laws, such as section 354.6, dealing with claims by POWs for injuries they incurred during World War II. "Vindicating victims injured by acts and omissions of enemy corporations in wartime is . . . within the traditional subject mat-

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[18] Treaties have the same preemptive force as statutes. *See, e.g., Husmann v. TWA*, 169 F.3d 1151, 1153 (8th Cir. 1999) (Warsaw Convention); *Asante Techs. v. Pmc-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1152 (N.D. Cal. 2001) (United Nations Convention on Contracts for the International Sale of Goods). Moreover, the complete preemption doctrine may be satisfied when the federal law provides a federal administrative remedy rather than a private cause of action and even when the federal law provides no remedy at all. *See Caterpillar*, 482 U.S. at 391 n.4; *Botsford v. Blue Cross & Blue Shield of Mont., Inc.*, 314 F.3d 390, 396-97 (9th Cir. 2002).

ter of foreign policy in which national, not state, interests are overriding, and which the National Government has addressed." *Garamendi,* 123 S. Ct. at 2390.[19]

With regard to wartime claims against Japan, the Treaty required Japan to pay reparations to the Allied Powers, in exchange for a waiver of all other reparations claims or other claims arising out of the war. As noted above, the Treaty reflected political and foreign policy decisions to fully and finally resolve war claims against Japan.

Using the reparations it received from Japan (the seized assets of Japan and its nationals, including Japanese companies, in the United States), Congress enacted the War Claims Act to distribute these funds to former POWs. The War Claims Act alone, which the POW petitioners inexplicably fail even to mention, provides the "exclusive" means of compensating former POWs. *Cf. Beneficial Nat'l Bank*, 123 S. Ct. at 2063-64. The Act does not authorize private lawsuits by POWs, and it makes abundantly clear that the federal government has "set forth procedures and remedies governing" such claims. *Id.* at 2063. Those "procedures and remedies" leave no room for the approach taken by California in section 354.6.

Indeed, as the legislative history of the War Claims Act shows, the need for uniform federal rules in this area was viewed as particularly important, with the question of war claims deemed "too complex" to be approached by the "piecemeal basis" of lawsuits. H.R. Rep. No. 801-976, at 4

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[19] In addition, statutes directly addressing foreign affairs – and the resolution of war claims in particular – are comparable to statutes dealing with Indian law, which displace state law even when there is no express indication of an intent to do so because of the "special federal interest" in such statutes. *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 543 (8th Cir. 1996) (citing *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974)). The federal interest in statutes such as the War Claims Act is at least as unique. *Cf. Garamendi*, 123 S. Ct. at 2390.

(1947) (SER 490). Thus, Congress considered and rejected a proposal to allow federal courts to adjudicate war compensation claims because of the need to "get some rationality out of this situation." 94 Cong. Rec. 564 (1948) (SER 501). Instead, Congress chose an exclusive federal commission "in view of the large number of claimants and the diversity in the specific circumstances giving rise to the claims." *Wiener v. United States*, 357 U.S. 349, 355 (1958). Given the overriding federal interest in the resolution of war claims, the need for uniformity in this area, and the complete and final resolution of their claims under the Treaty and the War Claims Act, it is beyond question that petitioners' claims are "necessarily federal in character." *Metro. Life Ins. Co.*, 481 U.S. at 63-64; *see also Beneficial Nat'l Bank*, 123 S. Ct. at 2064 (noting relevance of special federal interest in subject area in making complete preemption determination).[20]

The POW petitioners concede as they must that the "complete preemption doctrine" provides a proper basis for federal question jurisdiction. 02-1776 Pet. at 8. Nonetheless, they argue that federal law does not completely preempt their claims because common law claims between employees and employers are traditionally governed by state law, and their claims merely involve a state's regulation of "the fairness

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[20] In *Beneficial National Bank*, the Court stressed the importance of the historical need for a national banking system free from state interference. 123 S. Ct. at 2064 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819)). The historical recognition of the need for federal exclusivity of foreign relations, particularly the resolution of war claims, is at least as firmly rooted. *See Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796). Indeed, the need to consolidate this power in the national government was one of the motivating forces behind the abandonment of the articles of confederation and the adoption of the Constitution. *See, e.g., The Federalist No. 3*, at 14 (John Jay) (Jacob E. Cooke ed., 1961); *The Federalist No. 42*, at 279 (James Madison) (Jacob E. Cooke ed., 1961); *The Federalist No. 80*, at 535-36 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

with which [its] citizens are treated in the workplace." 02-1776 Pet. at 8. Petitioners' argument ignores that at the time their claims arose, they were not employees in a workplace traditionally subject to state law regulation. Rather, they were active duty members of the United States military who were held as prisoners of war by Imperial Japan.

C. Federal Jurisdiction Exists Because A Substantial Federal Question Is An Essential Element of Petitioners' Claims

Federal question jurisdiction also exists as to each of the POW petitioners' cases because they require the resolution of a substantial federal question. *City of Chicago v. Int'l Coll. of Surgeons,* 522 U.S. 156, 164 (1997) (where resolution of federal law question is necessary to a decision on the merits, federal question jurisdiction exists); *see also Verizon Md., Inc. v. Pub. Serv. Comm'n*, 122 S. Ct. 1753, 1758-59 (2002) ("the district court has [federal question] jurisdiction if the right of the [plaintiffs] to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another"). To state a claim under section 354.6, petitioners were required to prove the amount of wages or compensation they "should have been paid." Cal. Civ. Proc. Code § 354.6(a)(3). Because petitioners were active duty members of the military and prisoners of war at the time their claims arose, determining the amount of wages they should have been paid for their labor necessarily requires construction of both treaties and federal statutes governing the proper pay for military personnel held as POWs.[21] *See,*

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[21] Treaties to which the United States is a party govern whether, how much, and by whom petitioners "should have been paid" for their labor as prisoners of war during World War II. The 1929 Geneva Convention Relative to the Treatment of Prisoners of War, 47 Stat. 2021, and its 1949 counterpart, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135, provide comprehensive rules for when and under what circumstances prisoners of

e.g., 1949 Geneva Convention, 6 U.S.T. 3316, 75 U.N.T.S. (providing comprehensive rules for when and under what circumstances POWs are entitled to be paid); 1929 Geneva Convention Relative to the Treatment of Prisoners of War, 47 Stat. 2021 (same); *To T.F. Conway, Dep't of the Army*, 37 Comp. Gen. 29, 30 (1957) (declaration by the Comptroller General of the United States that wages and fees received by members of the military for labor that is connected in some way to their military service belong to the federal government and must be turned over to the federal treasury).

Thus, even though petitioners purport to assert only state law causes of action, a necessary element of their claim requires the resolution of substantial questions of federal law: whether and to what extent active duty military personnel held as POWs have a right to wages from third parties for whom they worked during their captivity.[22]

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war are entitled to be paid. For example, Article 34 of the 1929 Geneva Convention provides that "belligerents" are entitled to "fix[]" the wages of prisoners of war "by agreements." 47 Stat. at 2042. Article 34 further limits and defines which prisoners are entitled to working pay and under what circumstances. *Id.* For example, prisoners working in certain capacities (*e.g.*, camp administration) are generally not entitled to pay, while others (*e.g.*, those doing work "for the account of . . . private persons") are to be paid under "conditions . . . regulated by agreement with the military authority." *Id.* Similarly, Article 62 of the 1949 Geneva Convention allows the "Detaining Power" to establish a "fair working rate of pay," which may not be less than one-fourth of one Swiss franc for a full working day. 6 U.S.T. at 3364.

[22] The Northern District of California relied on an additional, independent basis for federal jurisdiction in these cases, holding correctly that the subject matter of petitioners' claims is governed by the federal common law of foreign relations. 02-1776 Pet. App. 75a & n.6. This Court has recognized that federal common law provides the rule of decision in cases involving foreign relations. *See, e.g.*, *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964). Several courts of appeals have concluded that the federal common law of foreign relations provides a

In sum, federal jurisdiction exists over all of these cases on several independent grounds. For all of the reasons stated above, the POW petitioners' jurisdictional arguments are not worthy of this Court's attention.

CONCLUSION

Petitioners have provided no plausible reason why this Court's limited resources should be devoted to reviewing the decision below. To be sure, many of the petitioners are World War II veterans who "incur[red] enormous personal loss to preserve our way of life against severe and imminent threats." 02-1776 Pet. at 6-7. Nevertheless, the inherent flaws in their legal arguments, especially following this Court's *Garamendi* decision, strongly counsel against review. Indeed, as one court noted with respect to claims similar to those brought by petitioners, "[i]t would be a disservice to [the] heroes of World War II to create the false hope of some sort of monetary recovery" based on state statutes that are constitutionally infirm. *Mitsubishi Materials Corp. v. Superior Ct.*, 130 Cal. Rptr. 2d 734, 737 (Cal. Ct. App. 2003). The petitions for a writ of certiorari should be denied.

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basis for removal jurisdiction. *See, e.g.*, *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540, 543 (5th Cir. 1997); *Republic of the Philippines v. Marcos*, 806 F.2d 344, 354 (2d Cir. 1986); *cf. New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 955 (9th Cir. 1996). Petitioners suggest, but do not directly argue as they did below, that the Ninth Circuit rejected the federal common law of foreign relations as a basis for removal in *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001), *aff'd on other grounds*, 123 S. Ct. 1655 (2003). 02-1776 Pet. at 4. But petitioners' suggestion reads *Patrickson* too broadly. *Patrickson* held only that removal jurisdiction could not be based on the simple fact that a foreign government had expressed an interest in the outcome of a commercial dispute. 251 F.3d at 803. The court did not have before it a case involving the federal government's exclusive powers to make wars, establish peace, and enter into treaties, nor did *Patrickson* purport to overrule other Ninth Circuit precedent such as *New SD, Inc.*, which held that federal common law can provide a basis for removal jurisdiction.

Respectfully submitted.

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Dated August 5, 2003

APPENDIX A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: WORLD WAR II ERA JAPANESE FORCED LABOR LITIGATION	**Master File No. MDL-1347 VRW** **ORDER NO. 5**
This document relates to: *Dunn v. Nippon Steel Corporation, et al.* *Llanza v. Mitsui & Co. (U.S.A.) Inc., et al.* *Mente v. Mitsui & Co., Ltd., et al.* *Resus v. Mitsui & Co., Ltd., et al.* *Rubenstein v. Ishihara Sangyo Kaisha, Ltd., et al.* *Saldajeno v. Ishihara Sangyo Kaisha, Ltd., et al.* *Tenney v. Mitsui & Co., Ltd., et al.* *Terrence v. Mitsui & Co., Ltd., et al.*	

Further to this Court's Order No. 4 entered September 21, 2000, to the Court's oral directive on September 21, 2000 regarding application of Order No. 4 to other matters, and pursuant to agreement by counsel that Order No. 4 shall apply to the five cases listed in the next paragraph,

IT IS HEREBY ORDERED that the following actions be and hereby are dismissed, on the same grounds as the dismissal of the actions identified in the caption of Order No. 4. The actions dismissed by virtue of this Order No. 5 as to which the Clerk shall enter judgment in favor of defendants, are as follows:

Dunn v. Nippon Steel Corporation, et al.

Mente v. Mitsui & Co., Ltd., et al.

Rubenstein v. Ishihara Sangyo Kaisha, Ltd., et al.

Tenney v. Mitsui & Co., Ltd., et al.

Terrence v. Mitsui & Co., Ltd., et al.

In view of the parties' inability to reach agreement as to whether Order No. 4 applies to cases in which the plaintiffs are or were nationals of the Philippines, that issue shall be determined through further proceedings. The four such cases currently pending in this Court are:

Llanza v. Mitsui & Co. (U.S.A.) Inc., et al.

Resus v. Mitsui & Co., Ltd., et al.

Saldajeno v. Ishihara Sangyo Kaisha, Ltd., et al.

Santo Domingo v. Ishihara Sangyo Kaisha, Ltd., et al.

APPROVED AS TO FORM:

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By: /s/ Bonnie E. Kane

Bonnie E. Kane

Attorneys for Plaintiffs in *Rubenstein v. Ishihara Sangyo Kaisha, Ltd., et al.* and *Tenney v. Mitsui & Co., Ltd., et al.*

DANIEL C. LEIB

By: /s/ Daniel C. Leib

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Attorneys for Plaintiffs in *Dunn v. Nippon Steel Corp., et al.*

WELLMAN & WARREN

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Attorneys for Plaintiffs in *Mente v. Mitsui & Co., Ltd., et al., Terrence v. Mitsui & Co., Ltd., et al., and Resus v. Mitsui & Co., Ltd., et al.*

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Michael Withey

Attorneys for Plaintiffs in *Santa Domingo v. Ishihara Sangyo Kaisha, Ltd., et al.*

LAW OFFICES OF LIONEL Z. GLANCY

By: /s/ Lionel Z. Glancy

Lionel Z. Glancy

Attorneys for Plaintiffs in *Llanza v. Mitsui & Co. (U.S.A.) Inc., et al.*

APPROVED AS TO FORM:

(Approval as to form by counsel does not constitute an appearance by any defendant in any action in which such defendant has not been served with summons or appeared, notwithstanding that such counsel may represent or have appeared for such defendant in some other action)

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By: /s/ Arne D. Wagner
Arne D. Wagner

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By: /s/ Matthew Digby
Matthew Digby

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By: /s/ Junji Masuda

Junji Masuda

KELLEY DRYE & WARREN LLP

By: /s/ Paul F. Doyle

Paul F. Doyle

IT IS SO ORDERED:

/s/ Vaughn R. Walker

VAUGHN R. WALKER
UNITED STATES DISTRICT JUDGE

APPENDIX B

THE WAR CLAIMS ACT

The War Claims Act of July 3, 1948, 62 Stat. 1240 (50 U.S.C. app. §§ 2001 et seq.) provides in pertinent part:

SEC. 2001. Foreign Claims Settlement Commission of the United States

(a) Employment of personnel; use of other facilities and services

The Foreign Claims Settlement Commission of the United States (hereinafter referred to as the "Commission") may, in accordance with the provisions of the civil-service laws and the Classification Act of 1949, as amended [5 U.S.C. 5101 et seq., 5331 et seq.], appoint and fix the compensation of such officers, attorneys, and employees, and may make such expenditures, as may be necessary to carry out its functions. Officers and employees of any other department or agency of the Government may, with the consent of the head of such department or agency, be assigned to assist the Commission in carrying out its functions. The Commission may, with the consent of the head of any other department or agency of the Government, utilize the facilities and services of such department or agency in carrying out the functions of the Commission.

(b) Rules and regulations; delegation of functions; time limit on filing of claims

The Commission may prescribe such rules and regulations as may be necessary to enable it to carry out its functions, and may delegate functions to any member, officer, or employee of the Commission. The Commission shall give public notice of the time when, and the limit of time within which, claims may be filed, which notice shall be published in the Federal Register. The limit of time within which claims may be filed with the Commission shall in no

event be later than March 31, 1952. The Commission shall take immediate action to advise all persons entitled to file claims under the provisions of this title [sections 2001 to 2016 of this Appendix] administered by the Commission of their rights under such provisions, and to assist them in the preparation and filing of their claims.

(c) Subpenas; issuance; contempt; witness fees; administration of oaths

(1) For the purpose of any hearing, examination, or investigation under this title [sections 2001 to 2016 of this Appendix], the Commission and those employees designated by the Commission shall have the power to issue subpenas requiring persons to appear and testify or to appear and produce documents, or both, at any designated place where such hearing, examination, or investigation is being held. The Commission or any employee so designated shall, upon application of a claimant, issue to such claimant subpenas requiring the attendance and testimony of witnesses or the production of documents, or both, required by such claimant in hearings upon his claim: *Provided*, That the claimant making such application pay the witness fees and mileage of any witness or witnesses subpenaed upon his request. The production of a person's documents at any place other than his place of business shall not be required, however, in any case in which, prior to the return date specified in the subpena with respect thereto, such person either has furnished the issuer of the subpena with a copy of such documents (certified by such person under oath to be a true and correct copy) or has entered into a stipulation with the issuer of the subpena as to the information contained in such documents.

(2) The Commission may, in case of a failure or refusal on the part of any person to comply with any such subpena, invoke the aid of any United States district court within the jurisdiction of which the hearing, examination, or

investigation is being conducted, or such person resides or transacts business. Such court may issue an order requiring such person to appear at the designated place of hearing, examination, or investigation, there to give or produce testimony or documentary evidence concerning the matter in question. Any failure to obey such order of the court shall be punishable by such court as a contempt thereof. All process in any such case may be served in the judicial district wherein such person resides or transacts business or wherever such person may be found.

(3) Witnesses subpenaed under this subsection shall be paid the same fees and mileage that are allowed and paid witnesses in United States district courts.

(4) Any member of the Commission, and any employee of the Commission authorized by the Commission to do so, may administer to, or take from, any person an oath, affirmation, or affidavit when such action is necessary or appropriate in the performance of the functions or activities of the Commission.

* * *

SEC. 2005. Prisoners of war

(a) "Prisoner of war" defined

As used in subsection (b) of this section, the term "prisoner of war" means any regularly appointed, enrolled, enlisted, or inducted member of the military or naval forces of the United States who was held as a prisoner of war for any period of time subsequent to December 7, 1941, by any government of any nation with which the United States has been at war subsequent to such date.

(b) Payment of claims; rate allowed; certification of claims

The Commission is authorized to receive, adjudicate according to law, and provide for the payment of any claim

filed by any prisoner of war for compensation for the violation by the enemy government by which he was held as a prisoner of war, or its agents, of its obligation to furnish him the quantity or quality of food to which he was entitled as a prisoner of war under the terms of the Geneva Convention of July 27, 1929. The compensation allowed to any prisoner of war under the provisions of this subsection shall be at the rate of $1 for each day he was held as a prisoner of war on which the enemy government or its agents failed to furnish him such quantity or quality of food. Any claim allowed under the provisions of this subsection shall be certified to the Secretary of the Treasury for payment out of the War Claims Fund established by section 13 of this title [section 2012 of this Appendix].

(c) Persons entitled to payments

Claims pursuant to subsection (b) shall be paid to the person entitled thereto, and shall in case of death of the persons who are entitled be payable only to or for the benefit of the following persons:

(1) Widow or husband if there is no child or children of the deceased;

(2) Widow or husband and child or children of the deceased, one-half to the widow or husband and the other half to the child or children of the deceased in equal shares;

(3) Child or children of the deceased (in equal shares) if there is no widow or husband; and

(4) Parents (in equal shares) if there is no widow, husband, or child.

(d) Additional definition of "prisoner of war"; payment of claims; rate allowed; persons entitled to payments

(1) As used in this subsection the term "prisoner of war" means any regularly appointed, enrolled, enlisted, or inducted member of the military or naval forces of the

United States, who was held a prisoner of war for any period of time subsequent to December 7, 1941, by any government of any nation with which the United States has been at war subsequent to such date.

(2) The Commission is authorized to receive, adjudicate according to law, and to provide for the payment of any claim filed by any prisoner of war for compensation--

(A) for the violations by the enemy government by which he was held as a prisoner of war, or its agents, of such government's obligations under title III, section III, of the Geneva Convention of July 27, 1929, relating to labor of prisoners of war; or

(B) for inhumane treatment by the enemy government by which he was held, or its agents. The term "inhumane treatment" as used herein shall include, but not be limited to, violation by such enemy government, or its agents, of one or more of the provisions of articles 2, 3, 7, 10, 12, 13, 21, 22, 54, 56, or 57, of the Geneva Convention of July 27, 1929.

(3) Compensation shall be allowed to any prisoner of war under this subsection at the rate of $1.50 per day for each day he was held as a prisoner of war on which he alleges and proves in a manner acceptable to the Commission--

(A) the violation by such enemy government or its agents of the provisions of title III, section III, of the Geneva Convention of July 27, 1929; or

(B) any inhumane treatment as defined herein.

Any claim allowed under the provisions of this subsection shall be certified to the Secretary of the Treasury for payment out of the War Claims Fund established by section 13 of this title [section 2012 of this Appendix]. In no event shall the compensation allowed to any prisoner of war under this subsection exceed the sum of $1.50 with respect to any one day.

(4) Claims pursuant to subsection (d)(2) shall be paid to the person entitled thereto, or to his legal or natural guardian if he has one, and shall, in case of death of the persons who are entitled be payable only to or for the benefit of the following persons:

(A) widow or husband if there is no child or children of the deceased;

(B) widow or husband and child or children of the deceased, one-half to the widow or husband and the other half to the child or children of the deceased in equal shares;

(C) child or children of the deceased (in equal shares) if there is no widow or husband; and

(D) parents (in equal shares) if there is no widow, husband, or child.

(e) Extension to Korean War prisoners

(1) As used in this subsection the term "prisoner of war" means any regularly appointed, enrolled, enlisted, or inducted member of the Armed Forces of the United States who was held as a prisoner of war for any period of time subsequent to June 25, 1950, by any hostile force with which the Armed Forces of the United States were actually engaged in armed conflict subsequent to such date and prior to the date of enactment of this subsection [Aug. 21, 1954], or any person (military or civilian) assigned to duty in the U.S.S. Pueblo who was captured by the military forces of North Korea on January 23, 1968, and thereafter held prisoner by the Government of North Korea for any period of time ending on or before December 23, 1968, except any person who, at any time, voluntarily, knowingly, and without duress, gave aid to or collaborated with or in any manner served any such hostile force.

(2) The Commission is authorized to receive and to determine, according to law, the amount and validity, and

provide for the payment of any claim filed by any prisoner of war for compensation for the failure of the hostile force by which he was held as a prisoner of war, or its agents, to furnish him the quantity or quality of food prescribed for prisoners of war under the terms of the Geneva Convention of July 27, 1929. The compensation allowed to any prisoner of war under the provisions of this paragraph shall be at the rate of $1 for each day on which he was held as a prisoner of war and on which such hostile force, or its agents, failed to furnish him such quantity or quality of food.

(3) The Commission is authorized to receive and to determine, according to law, the amount and validity and provide for the payment of any claim filed by any prisoner of war for compensation--

(A) for the failure of the hostile force by which he was held as a prisoner of war, or its agents, to meet the conditions and requirements prescribed under title III, section III, of the Geneva Convention of July 27, 1929, relating to labor of prisoners of war; or

(B) for inhumane treatment by the hostile force by which he was held, or its agents. The term "inhumane treatment" as used herein shall include, but not be limited to, failure of such hostile force, or its agents, to meet the conditions and requirements of one or more of the provisions of articles 2, 3, 7, 10, 12, 13, 21, 22, 54, 56, or 57 of the Geneva Convention of July 27, 1929.

Compensation shall be allowed to any prisoner of war under this paragraph at the rate of $1.50 per day for each day on which he was held as a prisoner of war and with respect to which he alleges and proves in a manner acceptable to the Commission the failure to meet the conditions and requirements described in subparagraph (A) or the inhumane treatment described in subparagraph (B). In no event shall the compensation allowed to any prisoner of war under this

paragraph exceed the sum of $1.50 with respect to any one day.

(4) Any claim allowed by the Commission under this subsection shall be certified to the Secretary of the Treasury for payment out of funds appropriated pursuant to this subsection and shall be paid by the Secretary of the Treasury to the person entitled thereto, and shall, in case of death or determination of death of the persons who are entitled, be paid only to or for the benefit of the persons specified, and in the order established, by paragraph (4) of subsection (d) of this section.

(5) Each claim filed under this subsection must be filed not later than one year from whichever of the following dates last occurs:

(A) The date of enactment of this subsection [Aug. 21, 1954];

(B) The date the prisoner of war by whom the claim is filed returned to the jurisdiction of the Armed Forces of the United States; or

(C) The date upon which the Department of Defense makes a determination that the prisoner of war has actually died or is presumed to be dead, in the case of any prisoner of war who has not returned to the jurisdiction of the Armed Forces of the United States;

(D) In the case of any person assigned to duty in the U.S.S. Pueblo referred to in paragraph (1) of this subsection, one year after the date of enactment of this subparagraph [June 24, 1970].

The Commission shall complete its determinations with respect to each claim filed under this subsection at the earliest practicable date, but in no event later than one year after the date on which such claim was filed.

(6) Any claim allowed under the provisions of this subsection shall be paid from funds appropriated pursuant to paragraph (7) of this subsection.

(7)(A) There are authorized to be appropriated such amounts as may be necessary to carry out the purposes of this subsection, including necessary administrative expenses.

(B) The Commission shall determine, from time to time, the share of its administrative expenses attributable to the performance of its functions under this subsection and make the appropriate adjustments in its accounts, and determinations and adjustments made pursuant to this subparagraph shall be final and conclusive.

(f) Vietnam conflict; definitions; authority of Commission; classes of claims; rate of compensation; certification for payment; persons entitled to payments; filing date; determination of claims; fund for payment; appropriations

(1) As used in this subsection--

(A) the term "Vietnam conflict" relates to the period beginning February 28, 1961, and ending on such date as shall thereafter be determined by Presidential proclamation or concurrent resolution of the Congress; and

(B) the term "prisoner of war" means any regularly appointed, enrolled, enlisted, or inducted member of the Armed Forces of the United States who was held as a prisoner of war for any period of time during the Vietnam conflict by any force hostile to the United States, except any such member who, at any time, voluntarily, knowingly, and without duress, gave aid to collaborated with, or in any manner served, such hostile force.

(2) The Commission is authorized to receive and to determine, according to law, the amount and validity, and provide for the payment of any claim filed by any prisoner of

war for compensation for the failure of the hostile force by which he was held as a prisoner of war, or its agents, to furnish him the quantity or quality of food prescribed for prisoners of war under the terms of the Geneva Convention of August 12, 1949. The compensation allowed to any prisoner of war under the provisions of this paragraph shall be at the rate of $2 for each day on which he was held as a prisoner of war and on which such hostile force, or its agents, failed to furnish him such quantity or quality of food.

(3) The Commission is authorized to receive and to determine, according to law, the amount and validity and provide for the payment of any claim filed by any prisoner of war for compensation--

(A) for the failure of the hostile force by which he was held as a prisoner of war, or its agents, to meet the conditions and requirements prescribed under chapter VIII, section III, of the Geneva Convention of August 12, 1949, relating to labor of prisoners of war; or

(B) for inhumane treatment by the hostile force by which he was held, or its agents. The term "inhumane treatment" as used in this subparagraph shall include, but not be limited to, failure of such hostile force, or its agents, to meet the conditions and requirements of one or more of the provisions of articles 3, 12, 13, 14, 17, 19, 22, 23, 24, 25, 27, 29, 43, 44, 45, 46, 47, 48, 84, 85, 86, 87, 88, 89, 90, 97, or 98 of the Geneva Convention of August 12, 1949.

Compensation shall be allowed to any prisoner of war under this paragraph at the rate of $3 per day for each day on which he was held as a prisoner of war and with respect to which he alleges and proves in a manner acceptable to the Commission the failure to meet the conditions and requirements described in subparagraph (A) of this paragraph or the inhumane treatment described in subparagraph (B) of this paragraph. In no event shall the

compensation allowed to any prisoner of war under this paragraph exceed the sum of $3 with respect to any one day.

(4) Any claim allowed by the Commission under this subsection shall be certified to the Secretary of the Treasury for payment out of funds appropriated pursuant to this subsection and shall be paid by the Secretary of the Treasury to the person entitled thereto, and shall, in the case of death or determination of death of the persons who are entitled, be paid only to or for the benefit of the persons specified, and in the order established, by subsection (d)(4) of this section.

(5) Each claim filed under this subsection must be filed not later than three years from whichever of the following dates last occurs:

(A) the date of enactment of this subsection [June 24, 1970];

(B) the date the prisoner of war by whom the claim is filed returned to the jurisdiction of the Armed Forces of the United States; or

(C) the date upon which the Department of Defense makes a determination that the prisoner of war has actually died or is presumed to be dead, in the case of any prisoner of war who has not returned to the jurisdiction of the Armed Forces of the United States.

The Commission shall complete its determinations with respect to each claim filed under this subsection at the earliest practicable date, but in no event later than one year after the date on which such claim was filed.

(6) Any claim allowed under the provisions of this subsection shall be paid from funds appropriated pursuant to paragraph (7) of this subsection.

(7) There are authorized to be appropriated such amounts as may be necessary to carry out the purposes of this subsection, including necessary administrative expenses.

(g) Manner of payment

Where any person entitled to payment under this section is under any legal disability, payment may be made in accordance with the provisions of subsection (e) of section 5 [section 2004(e) of this Appendix].

* * *

SEC. 2007. Commission's report on personal injury and property claims to President; findings; recommendations; public property; legislative effect

(a) The Commission shall inquire into and report to the President, for submission of such report to the Congress on or before March 31, 1950, with respect to war claims arising out of World War II, other than claims which may be received and adjudicated under the preceding sections of this title [sections 2001 to 2006 of this Appendix], and shall present in such report its findings on--

(1) the estimated number and amount of such claims, classified by types and categories; and

(2) the extent to which such claims have been or may be satisfied under international agreements or domestic or foreign laws.

(b) The report of the Commission shall contain recommendations with respect to--

(1) categories and types of claims, if any, which should be received and considered and the legal and equitable bases therefor;

(2) the administrative method by which such claims should be considered, and any priorities or limitations which should be applicable; and

(3) any limitations which should be applied to the allowance and payment of fees in connection with such claims.

(c) The Commission shall include in such report--

(1) such other recommendations as it deems appropriate; and

(2) such proposals for legislation as it deems appropriate for carrying out the recommendations made in such report.

(d) Such report, with accompanying evidence, shall be printed as a public document when received by the Congress.

(e) Nothing in this section shall be deemed to imply that the Congress will enact legislation--

(1) adopting any recommendations made under this section with respect to the consideration or payment of any type of claim; or

(2) making any moneys, including moneys remaining in the war claims fund after the making of payments from such fund provided for by this title [sections 2001 to 2016 of this Appendix], available for the payment of such claims.

* * *

SEC. 2010. Hearings on claims; finality of decision

The Commission shall notify all claimants of the approval or denial of their claims, and, if approved, shall notify such claimants of the amount for which such claims are approved. Any claimant whose claim is denied, or is approved for less than the full allowable amount of such claim, shall be entitled, under such regulations as the Commission may prescribe, to a hearing before the Commission or its representatives with respect to such claim. Upon such hearing, the Commission may affirm, modify, or revise its former action with respect to such claim, including a denial or reduction in the amount theretofore allowed with respect to such claim. The action of the Commission in allowing or denying any claim under this title [sections 2001 to 2016 of this Appendix] shall be final and conclusive on all

questions of law and fact and not subject to review by any other official of the United States or by any court by mandamus or otherwise, and the Comptroller General is authorized and directed to allow credit in the accounts of any certifying or disbursing officer for payments in accordance with such action.

APPENDIX C

CONSTITUTIONAL PROVISIONS

1. The Spending Clause of the United States Constitution, Art. 1, § 8, Cl. 1, provides:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

2. Section 8, Clause 10 of Article I of the United States Constitution provides that Congress shall have power:

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

3. Section 8, Clause 11 of Article I of the United States Constitution provides that Congress shall have power:

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

4. Section 8, Clause 12 of Article I of the United States Constitution provides that Congress shall have power:

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

5. Section 8, Clause 13 of Article I of the United States Constitution provides that Congress shall have power:

To provide and maintain a Navy;

6. Section 8, Clause 14 of Article I of the United States Constitution provides that Congress shall have power:

To make Rules for the Government and Regulation of the land and naval Forces;

7. Section 10, Clause 1 of Article I of the United States Constitution provides that:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility

8. Section 10, Clause 3 of Article I of the United States Constitution provides that:

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

9. Section 2, Clause 1 of Article II of the United States Constitution provides that:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

10. Section 2, Clause 2 of Article 2 of the United States Constitution provides that:

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of

the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

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FILED

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No. 02-1776

In the

Supreme Court of the United States

LESTER I. TENNEY, *et al.*,
Petitioners,

v.

MITSUI & CO., LTD., MITSUI & CO. (USA), INC., MITSUI MINING CO. LTD., MITSUI MINING USA, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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September 5, 2003

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PETITIONERS' REPLY BRIEF

Petitioners before this Court are United States citizens who survived slavery and abuse at the hands of Japanese private interests during the years 1941-45.[1] They filed suits in California State courts for lost wages and other relief, relying on the extension of the statute of limitations provided by the California Legislature in its enactment of California Code of Civil Procedure § 354.6.[2]

Respondents removed these actions, and others brought by former prisoners of war, to federal court. In the cases now before this Court, petitions for remand were denied, although some were (properly, in Respondents' view) remanded to the California courts.[3] The cases that remained in federal court were ultimately consolidated by the Judicial Panel on Multidistrict Litigation before the U.S. District Court for the Northern District of California.

The district court dismissed the cases, on the grounds that the 1951 Treaty of Peace with Japan, [1952] 3 U.S.T. 3169, TIAS 2490 ("the Treaty") effectively waived them.

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[1] Respondents' felt need to undermine and denigrate these heroes and the suffering they endured is as offensive as it is inexplicable. There is simply no reason to refer to "the labor [Petitioners] **allegedly** were forced to perform for Japanese corporations," as if the facts were in doubt. Brief of Respondents in Opposition ("Op. Cert."), at 4 (emphasis added).

[2] The text of this statute is set out in the Appendix to the original Petition ("Pet."), at 42a-43a.

[3] Respondents' narrative omits this important fact. Indeed, some of these remanded cases that have now been accepted for review by the California Supreme Court. *Mitsubishi Materials Corp. v. Superior Court*, 130 Cal. Rptr. 2d 734 (2003), *review granted, depublished*, 133 Cal. Rptr. 2d 734 (2003), and *Taiheiyo Cement Corp. v. Superior Court*, 129 Cal. Rptr. 2d 451 (2003), *review granted, depublished*, 133 Cal. Rptr. 2d 734 (2003). While Respondents profess to find the outcome to be a foregone conclusion, the fact is that the State court has not, as of this writing, revoked its determination to resolve these cases.

The district court declined to find merit in Respondents' other arguments, including the contentions that the cases were somehow barred by due process considerations or on the basis of the political question doctrine. The U.S. Court of Appeals for the Ninth Circuit affirmed, albeit for yet another reason: it held that § 354.6, which extended the limitations period for certain actions cognizable in State law, was a substantive, and hence an impermissible, intrusion into the federal government's constitutional prerogative to conduct foreign affairs.

Petitioners respectfully submit that the decision below should be reviewed, and reversed, by this Court for three principal reasons: because there was never federal subject-matter jurisdiction over these claims, which arise under State law and present no federal question; because the proper interpretation of the State statute at issue is the province of the State courts, which currently have this very question before them; and because the Treaty simply does not prohibit the maintenance of these causes of action. Moreover, the cases are of special importance, deriving not only from Petitioners' stature and the scale of the sacrifices they made for their country, but from the constitutional implications of permitting the decision below to stand.

A. This Court's Recent Decision in *Garamendi* Is Entirely Consistent with the Result Urged by Petitioners.

Respondents, in their Brief in Opposition, glibly base their position almost entirely on this Court's recent decision in *American Insurance Association v. Garamendi*, 123 S. Ct. 2374 (2003), as if the Court's disposition of that case virtually rendered this one moot. In fact, however, the reliance on *Garamendi* is misplaced, and the remainder of Respondents' argument is nothing more than repetition and paraphrasing of the opinion of the court below.

The keystone error in Respondents' position is stated in the very first paragraph of their Brief in Opposition. The sentence that is the foundation of their entire argument is the following, which they correctly place at the heart of the

holding of the court of appeals: "The United States exercised ["the core federal power to make and resolve war"] in [the Treaty], which **explicitly precludes** the claims asserted by Petitioners." Op. Cert., at 1 (emphasis added).

This sentence evidences two fundamental misconceptions, which undermine the entire structure of everything that follows. First, **no** constitutional "federal power to resolve war" includes authority for the federal government to waive private individuals' claims against private nationals of the former enemy. Any reading of this Court's opinion in *Garamendi* that supports such an utterly unprecedented result is by necessity incorrect. And second, **nothing** in the Treaty precludes assertion of the claims now before this Court. Respondents' Brief in Opposition hardly deigns to make the untenable argument that the United States as a matter of law may – or that in concluding the Treaty as a matter of fact it did – purport to waive the claims of American citizens against private entities in foreign lands.

Garamendi does not dictate the outcome of the case at Bar. Indeed, the Court declined in that decision to choose between the two theories of preemption included in the various concurring and dissenting opinions in *Zschernig v. Miller*, 389 U.S. 429 (1968). In that case, an Oregon probate statute that discriminated in its treatment of legatees based on their nationality, was held preempted, but the Justices disagreed as to the basis for their holding. *Zschernig* has thus been cited for two rather different propositions over the years: that the entire field of foreign affairs, and anything that touches on it, is exclusively federal terrain, and the States are precluded from legislating in ways that affect that area more than incidentally ("field preemption"); or that State legislation will be barred insofar as it comes into conflict with federal law or treaty ("conflict preemption").

The court below appears to have tacitly embraced the stronger interpretation of this Court's teaching in *Zschernig*. Yet this Court itself has never endorsed such an analysis over the last 35 years. Indeed, after setting out the

different plausible readings of the 1968 decision, Justice Souter's opinion for the Court in *Garamendi* noted that

> [i]t is a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions,

and proceeded expressly to defer resolution of that issue to another day. 123 S.Ct at 2389 (footnote omitted).

In *Garamendi*, this Court found an express conflict between the foreign policy pursued by the Executive branch, through the President and other officials over a period of years, and the consequences of the California State statute at issue. For this reason, it did not matter which reading of *Zschernig* correctly stated the law, since the State legislation was preempted either way.

Here, by contrast, it does matter, since there is no such conflict. The evidence of federal occupation of the field is the Treaty, and the Treaty does not preclude these actions. This is so for the reasons set out in the Petition: among them the limitation of the scope of the Treaty waiver to actions arising "in the course of prosecution of the War," the lack of legal authority (and the utter lack of precedent) for the Executive to waive claims of private Americans against private foreign interests, and the presence of a "most-favored-nation clause" in the Treaty according to which whenever better benefits are extended by Japan to another Allied Power by a subsequent international agreement, those benefits are automatically granted to the parties to the Treaty, including the United States. Thus, in Petitioners' submission, the Treaty does not preclude the maintenance of these private lawsuits, which do not come within the language of its waiver provisions as properly construed.

For these reasons, Respondents may succeed only on a field preemption theory, not on one of conflict preemption. This case, therefore, raises the very question that the majority of the Justices of this Court considered to be worthy

of their consideration in *Garamendi*. Respondents' argument on the conclusive nature of that decision assumes that *Garamendi* in fact answered the question that Justice Souter explicitly deferred. Far from making this Petition moot, that decision of this Court militates strongly in favor of review and reversal of the decision below.

Respondents contend, finally, that these cases are preempted because their maintenance would "interfere with policy choices reflected" in the Treaty. *See*, *e.g.*, Op. Cert. at 13, 15. It is difficult to know how they can state such a thing with such confidence. There is no evidence of record in support of the contention that the drafters of the Treaty, or its sponsors in the United States Senate, made an affirmative "policy choice" to sacrifice the private right of Americans to sue private Japanese tortfeasors for wrongful acts that took place during wartime but not "in the course of the prosecution of the War." Indeed, there is substantial evidence of the contrary proposition. *See* Pet., at 13-22.

Moreover, legislation and treaties do not typically take away the rights of Americans through the "reflection" of "policy choices." There is simply no case in the history of this land in which a treaty has purported to take away "national-vs.-national" claims, much less to do so through something so ephemeral as unarticulated "policy choices."

Respondents purport to rise to the challenge of finding a single instance since 1789 in which this has happened by citing, not a peace treaty, not a multilateral convention, but . . . a single line in the opinion of this Court in *Garamendi*. Op. Cert., at 14-15. In that context, however, the Court went no further than to note that "wartime claims against **even nominally private** entities have become issues in international diplomacy," 123 S. Ct. at 2387 (emphasis added). While this statement is clearly true, it falls far short of finding constitutional authority, or historical precedent, for the Executive to negotiate away the private claims of Americans against private foreigners.

In this case, furthermore, Respondents are not merely "nominally private": they were and are private in all senses, as witness the discussion of that key distinction by this Court in *Kawakita v. United States*, 343 U.S. 717 (1952).

As Petitioners have pointed out, finally, there is no basis to believe that the "policy choices" of the Executive were any different, in respect to the remedies to be made available to potential private litigants, in the European and Pacific Theaters of World War Two. Yet, in resolving private disputes between Holocaust victims and German nationals, the Executive concluded that it had no authority to waive private claims or to insist that their owners do so. *See* Pet., at 28-30. It is impossible to conceive why, in an area in which the Executive is powerless to act through formal means, its vague expression of "policy choices" should have preclusive effects on the rights of Americans.

B. Respondents' Invocation of Federal Question Jurisdiction Is Improperly Based on the Contents of the Answers in These Cases, Not of the Complaints.

Respondents continue to insist that, somehow, even without their incorrect interpretation of *Garamendi*, federal questions are presented by these cases in a way sufficient to invoke the jurisdiction of the federal courts pursuant to 28 U.S.C. § 1331. But that is simply not true. No federal questions are set out in the complaints, and no federal questions need to be resolved in order to dispose of them. What federal issues arise here are contained in Respondents' answers and in the motions to dismiss.

If the "well-pleaded complaint rule" means anything, it means that federal subject matter jurisdiction cannot come about in this manner.[4] And this Court has not stepped back from the classic articulation of the rule in *Caterpillar, Inc. v.*

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[4] Respondents also contend that there is complete diversity in one of the consolidated POW cases: *Dunn v. Nippon Steel Corp., et al.* (9th Cir. No. 01-17157). *See* Op. Cert., at 23-24. But whether there really is diversity in the *Dunn* case has never been determined by any court in these proceedings, and certainly may not be taken as established.

Williams 482 U.S. 386, 392 (1987): "To bring a case within [28 U.S.C. § 1331], a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, **of the plaintiff's cause of action**" (emphasis added) (quoting *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936)). Nor, contrary to Respondents' submission, was that long line of precedent tacitly reversed in *Verizon Maryland, Inc. v. Public Service Comm'n*, 122 S. Ct. 1753, 1758-59 (2002). Op. Cert., at 28. In *Verizon*, the question was whether the plaintiff had properly pleaded a private right of action under a federal statute, which this Court opined was itself a question "arising under" federal law within 28 U.S.C. § 1331. Nothing in that opinion suggests that a federal defense to a State law claim is sufficient to ground a finding of federal question jurisdiction.

As noted in the discussion of *Garamendi*, *supra*, Petitioners recognize that there exists a "complete preemption doctrine," under which there are certain areas of the law so federal in their character that any complaint, however artfully framed, must inevitably raise a federal question. Yet in making their argument that the subject matters of the complaints now before the Court are subject to this doctrine, Respondents continue to show an odd reluctance to indicate exactly which area they contend to have been completely preempted by federal activity.

Respondents submit that "the Treaty and the War Claims Act [of 1948, 50 U.S.C. App. § 2001 *et seq.*] completely preempt World War II claims against Japan and its nationals." Op. Cert., at 24-25. By this they appear to mean that the Treaty and the statute preclude any suit by **any** American against **any** Japanese national regarding **any** event or any alleged wrong that occurred during the War years. But such a reading is entirely inconsistent with the very language of the Treaty itself. The Treaty does not even purport to waive claims of private Americans against private Japanese interests that happened to have arisen between

1941 and 1945. Rather, the carefully negotiated language of Article 14(b) extends only to

> all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals **in the course of the prosecution of the war**, and claims of the Allied Powers for direct military costs of occupation.

Treaty, Article 14(b), Pet. at 99a.

At most, Respondents might be able to argue that there is complete federal preemption as to claims arising out of the conduct of Japanese nationals "in the course of the prosecution of the war." But they cannot demonstrate that the actions at issue here come within that limiting language.

There is no basis for the conclusion of the court below, which Respondents urge on this Court: that all causes of action, including those belonging to private American citizens who allege that they were injured at the hands of private Japanese nationals, "relating to the War" were taken away, without lawful authority, precedent, or even express and contemporaneous acknowledgment.

In furtherance of their effort to "federalize" Petitioners' claims, Respondents continually assault a position that Petitioners have never taken. Throughout their Brief in Opposition, in parallel to their incorrect contention that the Treaty bars (or even "explicitly precludes," Op. Cert. at 1) these causes of action, they uncontroversially insist that "[t]he Treaty does not create – expressly or otherwise – a private right of action against Japan or its nationals, nor does it authorize any State of the United States to create such a right." *See, e.g.*, Op. Cert. at 5.

But no party to these cases has attempted to locate a cause of action in the Treaty. The point is not that the Treaty is the source of Petitioners' right to sue those who enslaved them. It is that the Treaty did not take that preexisting right away. That right exists by virtue of the common law of the

States, and in this case of California in particular, which States retain the authority to prescribe the procedures, including the time limits, within which it may be exercised. And that is the authority exercised by the California Legislature in enacting § 354.6.

C. Respondents' "Alternate Theories" Supposedly Supporting the Decision Below Are of No Relevance to the Issues Presented Here.

Respondents propose that, even if the decision of the court of appeals is wrong in its express resolution of the cases below, this Court should still not intervene because the lower court might have reached the same conclusion through other routes. In particular, they submit that the cases might have been dismissed on due process grounds, or by virtue of the political question doctrine.

No judge to whom Respondents have ever attempted these arguments, however, has bought them. It is unclear even now just what right to due process Respondents feel to have been denied by a proper interpretation of § 354.6. Nor can they plausibly argue that it is unfair to hold Respondents to the strictures of California substantive law, when all that law provides of relevance to this case is that laborers should be paid the fair value of their work, and should not be subjected to torture. It is hardly unfair to subject anyone under any imaginable circumstances to that standard, whose application in the facts of this case cannot with a straight face be called "arbitrary or unfair." Op. Cert., at 21, citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981).

Moreover, the claim that a law extending limitations periods after the fact is itself unconstitutional as *ex post facto* legislation is without support. The learned historical analyses of this Court in *Stogner v. California*, 123 S. Ct. 2446, 2450-56 (Breyer, J.), and 2462-69 (Kennedy, J., dissenting), agree on one thing: the constitutional prohibition is against *ex post facto* criminal prosecutions. There is no comparable rule regarding the extension of limitations periods within which to bring civil actions.

Indeed, this Court has expressly rejected the very argument Respondents make, stating that "a statute of limitations . . . can be extended, without violating the Due Process Clause, after the cause of action arose **and even after the statute itself has expired**." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 229 (1995) (emphasis added).

Nor can Respondents' characterization of Petitioners' cause, in the context of presenting their argument on the political question doctrine, be permitted to go unchallenged. Respondents say that the former Prisoners of War "seek nothing less than a judicial reexamination of policy decisions made half a century ago, pursuant to which Japan became and continues to be a vital ally of the United States." Op. Cert., at 22. This is, of course, nothing to do with what Petitioners seek. There are no policy decisions to examine: there are common law rights to adjudicate. Since there never was a decision made by competent authorities to strip these Petitioners of their rights to pursue justice against those who tortured them, who abused them, and who stole the fruits of their labor without compensation, adjudication of these cases would pose no threat to the standards laid down by this Court in *Baker v. Carr*, 369 U.S. 186 (1962).

Trying cases involving facts that occurred long ago and far away may be difficult from a practical perspective, but such actions are not excluded for that reason from the competence or the jurisdiction of the judiciary. Neither does the fact that foreign governments, or even our own, may be made uncomfortable by the light that our judiciary casts into the dark corners of such cases bear on the power, much less on the obligation, of our Courts to hear legally cognizable controversies properly laid before them.

Neither due process concerns nor the political question doctrine bars consideration of these cases.

Conclusion

For all of the foregoing reasons, as well as for those set out in the Petition and in the Briefs of the *Amici* supporting Petitioners, a writ of certiorari should issue.

Respectfully submitted,

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IN THE

Supreme Court of the United States

LESTER I. TENNEY, *et al.*,

Petitioners,

v.

MITSUI & CO., LTD., MITSUI & CO. (USA), INC., MITSUI MINING CO. LTD., and MITSUI MINING USA INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* VETERANS OF FOREIGN WARS OF THE UNITED STATES, THE AMERICAN DEFENDERS OF BATAAN AND CORREGIDOR, THE AMERICAN EX-PRISONERS OF WAR, THE AMERICAN GI FORUM, THE BATAAN VETERANS ORGANIZATION, THE BATTLING BASTARDS OF BATAAN, THE CATHOLIC WAR VETERANS OF THE UNITED STATES OF AMERICA, THE CENTER FOR INTERNEE RIGHTS, THE DISABLED AMERICAN VETERANS, THE FLEET RESERVE ASSOCIATION, AND THE LEGION OF VALOR OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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INTRODUCTION

This brief[1] is submitted on behalf of the Veterans of Foreign Wars of the United States, the American Defenders of Bataan and Corregidor, the American Ex-Prisoners of War, the American GI Forum, the Bataan Veterans Organization, the Battling Bastards of Bataan, the Catholic War Veterans of the United States of America, the Center for Internee Rights, the Disabled American Veterans, the Fleet Reserve Association, and the Legion of Valor of the United States of America, to urge this Court to grant the Petition for a Writ of Certiorari in the case of *Lester Tenney, et al, v. Mitsui & Co. (USA), Inc., et ux* ("*Tenney*") [Docket No. 02-1776], in order to settle important questions of law, correct a grave injustice, and secure uniformity of decision.

STATEMENT OF INTEREST

Amici are veterans groups who act on behalf of, serve, and protect the rights of past, present and future members of the United States armed forces. Combined, amici represent approximately five million (5,000,000) veterans our our armed forces.

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[1] Amici state that this brief has been prepared in whole by C. Daniel Carroll, Counsel of Record for amici. No person or entity, other than amici, their members, or their counsel, have made a monetary contribution to the preparation or submission of the brief. All parties before the Court have consented in writing to the filing of this brief. A copy of that consent is submitted herewith.

The Veterans of Foreign Wars of the United States ("VFW") was founded in 1899. One of the fundamental purposes of the VFW, as expressed in its Congressional Charter [36 U.S.C. § 113], is "to assist worthy comrades; to perpetuate the memory and history of our dead; and to assist their widows and orphans." Fulfilling that promise and purpose, the 1.9 million members of the VFW are actively engaged in protecting the rights of America's veterans and assuring that they receive the care and recompense they deserve for their service to the Country in defense of our freedoms.

The American Defenders of Bataan and Corregidor ("ADBC") are a group of more than 5,000 men and women who served on Bataan, Corregidor, the Philippine Archipelago, Wake Island, Midway, Guam, Dutch East Indies, the Asiatic Fleet during World War II. The ADBC's members became Prisoners of War during the months between December 1941 to May 1942, and were held in captivity until September/October 1945. Through tremendous sacrifice, members of the ABDC stood together against overwhelming odds and were able to hold off the enemy for six months at the outbreak of World War II, enabling mobilization back home, and giving America the ability to fight an offensive war. Today, the ABDC works to promote and protect the interests and memories of these valiant heros.

The American Ex-Prisoners of War is a national organization for American citizens who were captured by the enemy. Membership is open to all former prisoners of war from any theater in any war, all former civilian internees, and to the families of such persons. Founded on April 14, 1942, the organization was Congressionally chartered [36 U.S.C. § 2101] on August 10, 1982. At the present time, the American Ex-Prisoners of War has over 300 Chapters and State Departments, representing over 30,000 members. Its purpose

is its motto: "We exist to help those who cannot help themselves." The organization has a keen interest in seeing that the rights of prisoners of war are upheld in our courts and not denied for the purpose of political expediency.

The American G.I. Forum ("AGIF") is a Congressionally Chartered veterans organization [36 U.S.C. § 21001] founded in March 1948 to protect the rights of Hispanic war veterans[2] as American veterans. The AGIF was formed initially to combat discrimination against Hispanic veterans in housing,

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[2] Tens of thousands of Hispanics fought to defend the United States and the free world during World War II. They distinguished themselves in battles at Bataan, Attu, North Africa, in Europe and in the Pacific. Many died, and many suffered the indignities and horrors of forced labor for the profit of private Japanese companies.

Of particular note, the 200th/515thCoast Artillery Regiment, a national guard unit from New Mexico which was federalized and stationed in the Philippines in 1941 fought valiantly in Bataan. Approximately one-third of the men in this Regiment were Hispanic, with about 79 Native Americans, as well. When the Japanese bombed Clark Field and Fort Stotsenberg on the Philippine Islands just hours after the attack at Pearl Harbor, the 200th Coast Artillery (anti-aircraft) was the first to fire on the enemy. The regiment fought fiercely through the next four months, although starving and diseased, until American and Filipino forces were surrendered at Bataan on April 9, 1942, with Corregidor falling a month later.

Of the 1,800 men in the Regiment, less than one-half survived the war and one-third of these were dead within one year of returning to the U.S. Today, only about 90 of these brave men remain. These Hispanic soldiers returned to the United States secure in their belief in the American dream, which included the protection of our U.S. Constitution, and the security afforded by our judicial system.

employment and education, and has always believed, and fought, to ensure that all veterans are treated fairly and equally, and that all veterans are all afforded the protection of the American system for which they fought. The AGIF has continuously maintained advocacy for Hispanics as its primary role, and is actively involved in various other issues important to the Hispanic community such as employment, housing, and civil rights. These activities are supported by the respected voice and advocacy of a national membership of more than 140,000 proven American patriots.

The Battling Bastards of Bataan ("BBB") is an organization dedicated to the brave warriors who served in the battle fields of Bataan, Philippines, during World War II. Its mission is to perpetuate the story of Bataan and to leave to our descendants the truth as its members knew it. The BBB serves as a reminder that the precepts of courage, devotion to duty, and sacrifice displayed by the men and women of Bataan, both Filipino and American, have not and will not become outmoded. Its motto is "Keep the faith in our country as exhibited by those men and women who fought in defense of Bataan, Philippines in 1942. Freedom is not free."

The Bataan Veterans Organization ("BVO") is composed of veterans who survived the bloody battles in the defense of Bataan and Corregidor in the Philippine Islands, and then the Bataan Death March. The BVO's members also survived hell ships that transported them to the mainland of Japan and Korea; and years of the most inhumane treatment known to mankind, as prisoners of war.[3]

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[3] Many in the BVO, like the members of the American GI Forum discussed in footnote 2, belonged to the New Mexico Army National Guard's 200th Coast Artillery Regiment.

The Catholic War Veterans of the United States of America ("CWV") is a Congressionally Chartered association [36 U.S.C. § 2601] which was formed in 1935. Its Charter was signed by President Reagan on August 17, 1984. An organization of more than 25,000 veterans, the CWV's mission is to make the entire nation acutely aware of the struggle and needs of its veterans, their widows and children, to educate the public on the needs and sacrifices of veterans and their families, to promote patriotism and allegiance to the Constitution, and to advance peace and respect for one another, particularly the family. CWV's members cooperate to the fullest extent with all veterans organizations in order to better serve the interests of the men and women who served in each of the wars in which our nation has been involved.

The Center for Internee Rights, Inc. ["CFIR"] is a non-profit corporation formed in 1990 to represent the plight of the Allied Prisoners of War, Civilian Internees, and those in hiding who suffered untold deprivation by the Imperial Japanese Forces in World War II, and others who suffered private deprivation at the hands of private companies. The CFIR's primary agenda is to seek an apology and compensation for its members and other victims from the Japanese Government and the private companies who perpetrated these wrongs. The CFIR also provides information and research data to victims seeking legal claims for slave labor, forced labor and loss of personal property and assets.

The Disabled American Veterans ("DAV") was formed in1920 and chartered by Congress in 1932 [36 U.S.C. § 90]. The DAV is the official voice of America's service-connected disabled veterans, a strong, insistent voice that represents all of America's 2.1 million disabled veterans, their families and their survivors. Because it serves those who were disabled in

service of their government, the DAV has special concern for those who were systematically tortured, starved, beaten, denied medical care, and used as a forced laborers and slaves of private multinational and/or Japanese corporations during World War II, and who have never been paid wages or other restitution for their forced labor.

The Fleet Reserve Association ("FRA") is a nonprofit organization comprised of enlisted personnel (active duty, reserve, and retired) of the U.S. Navy, Marine Corps and Coast Guard. The FRA membership, 140,000 strong, is devoted to promoting and protecting the interests of personnel serving in the sea services. Since 1924, the FRA has been a leading advocate on Capitol Hill for the men and women who serve on active duty, in the reserve, or have joined the military retired community.

The Legion of Valor was organized on April 23, 1890, in Washington, DC, by a group of Civil War and Indian War Campaign veterans who were recipients of the Medal of Honor. Membership was subsequently enlarged to include recipients of the Army Distinguished Service Cross, the Navy Cross, and the Air Force Cross. At its inception, the name was "The Medal of Honor Legion." On August 4, 1955, Congress chartered [36 U.S.C. § 613] "The Army and Navy Legion of Valor of the United States," and on June 21, 1961, the name of the organization became the "Legion of Valor of the United States of America, Inc." The Legion of Valor's purpose is to advance the interests of members of the armed forces of the United States, to enhance their prestige and understanding, and to stimulate patriotism in the minds of youth as well as the national pride in the interest of the armed forces of the United States.

During this time when our fighting forces are actively engaged in wars around the world, the joint amici urge the United States Supreme Court to undertake review of the decision in *Deutsch v. Turner*, 317 F.3d 1005, *as amended* at 324 F.3d 692 (9th Cir. 2003) ["*Deutsch*"].[4] The Ninth Circuit's opinion in *Deutsch* has denied important rights to Petitioners, a group of World War II American Prisoners of War who were forced to work ***without pay*** for ***private***[5] Japanese companies, while being systematically starved, beaten and denied medical care. The Respondents herein, including global conglomerates such as Mitsui, Mitsubishi, and their related entities, unjustly enriched themselves during the war by employing the forced slave labor of these and other American Prisoners of War. Yet, these multinational companies have never apologized or paid any restitution or other compensation to our brave veterans.

It is of vital importance that private foreign entities know that they cannot treat American Prisoners of War horrifically and in contravention of international law without resulting liability, nor can they hide behind International Treaties which were not expressly enacted for their benefit. In granting certiorari and reversing the decision of the Ninth Circuit in *Deutsch*, this Court will ensure that the men and women who are and have been called to defend our Country are not deprived of the legal, moral and ethical rights to which they are entitled. It is a grave injustice to deny the

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[4] The *Deutsch* opinion, as amended, is set forth in the Petition at pages 1-a through 68-a, and is incorporated herein by reference.

[5] Importantly, these companies were not nationalized, nor were they the agents of the Japanese government. They were "*private*" in every sense of the word.

right of compensation to our aging World War II veterans[6] who so willingly and steadfastly secured peace for the world when they were called to do so, and who in the course of that mission were tortiously abused by private Japanese entities. Many of these Prisoners of War who were worked to death or near death for global giants such as Mitsui and Mitsubishi were survivors of the Bataan Death March before they were turned over to, and made the responsibility of, these private companies to work in their mining operations. To allow these private companies to profit from the forced slave labor of American Prisoners of War violates every notion of justice and fair play accepted in the civilized world. This Honorable Court should not let such an injustice stand.

REASONS FOR GRANTING THE WRIT

A. Review is Needed to Resolve Important Issues of Law

The *Deutsch* decision attempts to deny former prisoners of war their rights under a California law which specifically extends the statute of limitations for filing claims involving slave and forced labor during World War II. *California Code of Civil Procedure*, Section 354.6.[7] Denial of civil redress is a serious question of law, which should not be decided lightly. For this reason alone, the Court should grant the

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[6] Virtually all of the Petitioners are over eighty (80) years old. Many are infirm and disabled as a result of their treatment by Respondents. This Petition represents their last chance to obtain remuneration for Respondents' exploitation.

[7] The full text of Section 354.6 is set forth in the Petition at pages 122-a through 123-a, and is incorporated herein by reference.

requested Writ of Certiorari. Moreover, vitiating a statute which was passed by the California Legislature to establish important public policy principles - - to protect the rights of California residents by allowing common law and statutory wage and tort claims against companies that are presently doing business in California, and which engaged in extremely harmful behavior during World War II - - raises questions of the utmost legal, moral and social importance.

Consider the effect of the *Deutsch* decision on our present day and future fighting forces. If the Ninth Circuit's decision stands, they will know that they will have no redress for intentional harms perpetrated upon them by private entities while they are defending their Country. In effect, they are asked to risk the ultimate sacrifice, knowing that the Courts of their homeland will protect foreign non-governmental entities who exploit them for private financial gain. What effect will such a result have on our military's morale?

Similarly, consider the effect of the *Deutsch* decision on foreign countries, their nationals, and their private companies. They now have a roadmap to the torture and exploitation of American Prisoners of War during time of conflict which will be free of redress. This result is patently wrong, and calls for resolution by the highest Court in our land.

In addition, the Ninth Circuit's denial of Petitioners' rights to compensation from the private Japanese companies who harmed them is based upon a misinterpretation of the Multilateral Treaty of Peace with Japan [1952] 3 U.S.T 3169, TIAS 2490 (1951) ("the 1951 Treaty").[8] A review of the

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[8] The full text of the 1951 Treaty is set forth in the Petition at pages 87-a through 121-a, and is incorporated herein by reference.

1951 Treaty discloses no express intention to wholly preclude common law tort claims by American citizens against private Japanese corporations for conduct which occurred while the countries were at war. Rather, the Treaty's immunity protection is ***expressly limited*** to claims against "Japan and its nationals arising out of acts taken by Japan and its nationals ***in the course of the prosecution of the war***." 1951 Treaty, Paragraph 14(b), *supra*, 3 U.S.T. at p. 3183 (Emphasis added). A review of the claims of Petitioners herein discloses that no such rights are alleged or sought to be enforced. The claims before this Court are those of American citizens against Japanese corporations (and their American sub-entities) for acts which were undertaken by those Japanese corporations ***for their private gain***.[9] Clearly, the efforts of these private companies were not the acts of the Japanese government which itself was "*prosecuting*" the war against the Allied Powers. Rather, they were the acts of private industry undertaken for private greed - - free labor - - and profit.[10] Thus, the Ninth Circuit erred in ruling that

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[9] Article 31 of the Geneva Convention Relating to the Treatment of Prisoners of War, 47 Stat. 2021, T.S. 846 (1929), allowed Prisoners of War to be forced to do labor, but ***expressly precluded*** such labor from having any connection with the operation of the war (such as putting Prisoners of War to work making munitions). Thus, Respondents will be hard-pressed to argue that their actions were undertaken "in the course of the prosecution of the war" without expressly admitting a violation of the Geneva Convention, a concession that Respondents have yet to make.

[10] While this forced labor may have ultimately benefitted the Japanese "war economy" in that the mined materials were utilized to manufacture munitions, the direct beneficiaries were Mitsui, Mitsubishi and other private companies who lined their pockets with the fruits of the free forced labor. This action properly seeks the disgorgement of those ill-gotten gains for the benefit of the American citizens who suffered this grave injustice.

these private companies were acting "*in the course of the prosecution of the war.*" Amici urge this Honorable Court to construe the 1951 Treaty to ensure that the rights of American soldiers and citizens - - past, present and future - - are protected.

Moreover, a review of the 1951 Treaty discloses indicia of an intent ***not*** to immunize private Japanese corporations from such claims. As pointed out by Petitioners in their Petition, when one compares the scope of the post-Treaty immunity granted to the prevailing Allied Powers with those granted to the defeated Japanese, the distinction between the immunities, and thus the impropriety of the Ninth Circuit's decision in *Deutsch*, becomes clear. Paragraph 19(a) of the 1951 Treaty grants immunity to the Allied Powers for "all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war ***or out of actions taken because of the existence of a state of war.***" 1951Treaty, Paragraph 19(a), *supra*, 3 U.S.T. at p. 3187 - 3188 (Emphasis added).

The expansiveness of the immunity language of paragraph 19(a), when compared with the more limited immunity granted to Japan by Paragraph 14(b) for "acts taken by Japan and its nationals *in the course of the prosecution of the war*," is the yardstick by which this case should be decided. Had Japan and its nationals been afforded immunity for "*actions taken because of the existence of a state of war*," then the decision of the Ninth Circuit in *Deutsch* might have been well reasoned. Clearly, the actions of the Respondents herein were taken "*because of the existence of a state of war.*" However, those same actions were ***not*** taken "*in the course of the prosecution of the war*," as Mitsui, Mitsubishi and their Co-Respondents neither declared nor prosecuted a war

against the United States and the Allied Powers.[11] Thus, based upon the negotiated language of the 1951 Treaty, the Respondents herein do not enjoy immunity for their private actions undertaken for corporate greed and profit. Amici respectfully urge this Court to grant Petitioners' Petition for a Writ of Certiorari, and to reverse the plainly erroneous decision of the Ninth Circuit in *Deutsch.*

B. Review is Needed to Secure Uniformity of Decision

A second basis for granting certiorari is the existence of a split of authority between California Courts, and between the California Courts and the Federal Courts, over the application of Section 354.6 and the doctrine of "express preemption" by virtue of the federal government's foreign affairs power. Because of the legal, moral and social importance of the issues presented, amici respectfully submit that this Honorable Court should grant certiorari and resolve this split of authority.

Deutsch, supra, 317 F.3d 1005, and *Mitsubishi Materials Corp. v. Superior Court* (2003) 106 Cal.App.4th 39, __ Cal.Rptr.2d __ [Fourth District], each hold Section 354.6 unconstitutional, *Deutsch* based upon a "foreign affairs power" analysis, and *Mitsubishi Materials* based upon an "express preemption" analysis. By contrast, *Taiheiyo Cement Corp. v. Superior Court* (2003) 105 Cal.App.4th 398, 129 Cal.Rptr.2d 451 [Second District], holds that Section 354.6 passes Constitutional muster based upon an "express

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[11] See, e.g., *Kawakita v. United States* (1952) 343 U.S. 717, 727 - 728, 72 S.Ct. 950, 957 - 958, 96 L.Ed. 1249 [The fact that a company was part of the Japanese "*war economy*" did not change its status from private to governmental].

preemption" analysis. These decisions are in direct conflict,[12] and may lead to disparate results for similarly situated parties.[13]

Amici respectfully submit that *Taiheiyo Cement* is the most solidly reasoned decision. It considers the language and intent of the 1951 Treaty, and allows the scope of the Treaty's immunities to be decided by a jury rather than being usurped by the Courts at the pleading stage.[14] Under an express preemption analysis, the law requires just that, ***express*** preemption. See, e.g., *Metropolitan Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724, 738, 105 S.Ct. 2380,

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[12] The California Supreme Court has granted Petitions for Review in *Mitsubishi Materials* and *Taiheiyo Cement* to resolve this conflict. See, *Taiheiyo Cement Corp. v. Superior Court*, 66 P.3d 1231, 133 Cal.Rptr.2d 147, 2003 Daily Journal D.A.R. 4776 (Cal., Apr 30, 2003) (NO. S113759); *Mitsubishi Materials Corp. v. Superior Court*, 133 Cal.Rptr.2d 147, 2003 Daily Journal D.A.R. 4798 (Cal., Apr 30, 2003) (NO. S114470).

[13] Particularly frustrating from the standpoint of amici is the fact that *Taiheiyo Cement* involves the claims of Jae Won Jeong, a former Korean national who is now a naturalized American citizen, who did not serve in the United States' armed forces, while the instant matter involves the claims of Petitioner Lester Tenney and others who are natural born Americans who were either conscripted into or voluntarily enlisted for military duty on behalf of the United States during World War II. Consider the incongruity of results - - if the present state of the decisional law stands, the naturalized Korean-American citizen who was forced into slave labor prior to his American naturalization will have a claim for damages, while the natural-born American heroes will be left out in the cold. Amici respectfully submit that such a result cannot stand.

[14] All of these conflicting cases were decided by the Trial Courts on Demurrers and/or Motions for Judgment on the Pleadings.

2388, 85 L.Ed.2d 728; *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516-518, 112 S.Ct. 2608, 2617 - 2618, 120 L.Ed.2d 407; see also *Tafflin v. Levitt* (1990) 493 U.S. 455, 466, 110 S.Ct. 792, 798 - 799, 107 L.Ed.2d 887. Implied preemption is insufficient; rather, the drafters of the statute, or in this case the 1951 Treaty, in question must expressly preempt the claim sought to be enforced. As the analysis set forth *supra* (at pp. 3 - 6) explains, the language of the 1951 Treaty does not expressly preempt Petitioners' claims. Only claims for "acts taken by Japan and its nationals *in the course of the prosecution of the war*" are preempted. At a very minimum, Petitioners are entitled to have a jury determine whether the acts of private Japanese companies in utilizing forced slave labor of American citizens is "*in the course of the prosecution of the war.*"

Similarly, the Ninth Circuit's application of the foreign affairs power doctrine in *Deutsch* is misplaced. Section 354.6 is not an intrusion into foreign affairs. Rather, it seeks to permit state common law claims arising from the tortious conduct of private companies doing business in California against present California residents. Although these wrongs occurred during wartime, they were perpetrated for the ***private financial benefit*** of Mitsui, Mitsubishi, and other similarly situated companies. Requiring those Japanese companies [and their present-day California subsidiaries and successors] to compensate American citizens for the value of their forced slave labor is neither unfair nor inappropriate.

The decision in *Taiheiyo Cement* is well-reasoned, and protects the rights of individual citizens against the horrendous tortious conduct alleged. By contrast, the decisions in *Deutsch* and *Mitsubishi Materials* are incorrect, perpetrate a grave injustice on true American heroes, and should not stand. Amici respectfully submit that the requested Writ of Certiorari should be granted, and that the

inconsistency of decision and result between these two lines of cases should be resolved by the United States Supreme Court.

CONCLUSION

The *Tenney* and *Deutsch* cases raise very significant, serious and important issues of grave national importance. In the view of the amici, the Ninth Circuit has stripped the Petitioners in *Tenney* of their fundamental constitutional rights based upon a misguided analysis of the 1951 Treaty of Peace with Japan. In the interest of justice for our World War II Prisoners of War, for our present-day soldiers, and for the soldiers of future generations, it is respectfully requested that the United States Supreme Court grant Petitioner Lester Tenney's Petition for a Writ of Certiorari and to reverse the decision of the Court of Appeal of the Ninth Circuit.

Respectfully submitted,

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Nos. 02-1773, 02-1776, 02-1778, 02-1784

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In The
Supreme Court of the United States

SUK YOON KIM, on behalf of himself and all others similarly situated,

Petitioner,

v.

ISHIKAWAJIMA HARIMA HEAVY INDUSTRIES, LTD., *et al.*,

Respondents.

[Additional Captions On Inside Cover]

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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13 pp

No. 02-1776

LESTER I. TENNEY, *et al.*,

Petitioners,

v.

MITSUI & CO., LTD., *et al.*,

Respondents.

No. 02-1778

ZHENHUAN MA, SHANG-TING SUNG, AIZHU SU, and CHUNSHENG TIAN, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

KAJIMA CORPORATION, *et al.*,

Respondents.

No. 02-1784

ALBERTO SALDAJENO, *et al.*,

Petitioners,

v.

ISHIHARA SANGYO KAISHA LTD., *et al.*,

Respondents.

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BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The State of California as amicus curiae files this brief pursuant to Rule 37 of the Rules of the Supreme Court of the United States.

INTEREST OF THE STATE OF CALIFORNIA AS AMICUS CURIAE

The Attorney General of the State of California submits this amicus curiae brief in support of the petition for writ of certiorari filed by petitioners urging the Court to grant certiorari of the Ninth Circuit's decision in *Deutsch v. Turner*, 324 F.3d 692 (9th Cir. 2003). In that decision, the Ninth Circuit struck down a California statute extending the limitations period for claims for unpaid wages and injury owed to slave laborers forced to work for private companies during World War II. The Court of Appeals found the California statute, which provides a forum for the adjudication of such claims, to violate the foreign affairs provisions of the United States Constitution. The Ninth Circuit's overly expansive interpretation of the foreign affairs doctrine is at odds with this Court's recent analysis of the foreign affairs doctrine in *Am. Ins. Ass'n v. Garamendi*, 539 U.S. ___, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003). The lower court ruling, moreover, has far-reaching implications for the sovereignty of the States. Absent guidance from the Court, the lower court's decision will impede the ability of States to enact legislation in areas of traditional state competence.

As California's chief law officer (see CAL. CONST. art. V, § 13), the Attorney General has a strong interest in defending the validity of this important and historic legislation, which compels him to urge review of the lower court's decision. Accordingly, the Attorney General submits this brief in support of these four petitions, all of which seek certiorari of the Ninth Circuit's decision.

SUMMARY OF ARGUMENT

The State of California urges review of *Deutsch v. Turner* because of the important, indeed historic, interests at stake and the wide-ranging harm that may be caused by the Ninth Circuit's misapplication of the foreign affairs doctrine.

The statute at issue, California Code of Civil Procedure section 354.6 ("Section 354.6"), is state legislation that has traditionally been deemed within the authority and province of the States to enact, namely, the extension of a statute of limitations and the provision of a state forum for the litigation of tort-related grievances. In this case, that state authority has been applied to a matter of undeniable importance, claims for unpaid wages and injury owed to slave laborers who were forced to work for private companies during World War II.

The Ninth Circuit below, however, held that Section 354.6 violates the foreign affairs provision of the United States Constitution. The Ninth Circuit reached this decision by applying a novel and unworkable standard, namely, that state regulation of "matters related to war" violates the foreign affairs doctrine, regardless of the

absence of a conflicting federal statute or treaty, regardless of how incidental or tangential the nexus between the statute and foreign affairs powers might be, and regardless of the importance of the State's countervailing interest underlying the statute.

The lower court's unprecedented and expansive standard jeopardizes the States' sovereign interests in this important matter and, further, will impair the ability of States to enact legislation in areas of traditional state competence.

Moreover, certiorari is warranted, not simply because the *Deutsch* decision is at odds with *Garamendi*, but also because *Garamendi* does not fully resolve the unique and important questions presented here.

ARGUMENT

I. THE LOWER COURT'S DECISION UPSETS THE BALANCE OF POWER BETWEEN THE STATES AND THE FEDERAL GOVERNMENT BY UNDULY ENCROACHING UPON THE STATES' SOVEREIGN POWERS.

The Ninth Circuit's expansion of the foreign affairs doctrine undermines California's sovereignty in an area of state interest that is centuries old.

"[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). "The powers not delegated to the United States Constitution, nor prohibited to it by the states, are reserved to the states respectively, or to the people." U.S. CONST. art. X.

"Within this system, the Federal Government is vested with limited powers, while the States retain substantial sovereign authority." *Gregory v. Ashcroft*, 501 U.S. at 457. This federalist system requires a proper balance between the States and the Federal Government. "In the tension between federal and state power lies the promise of liberty." *Id.* at 459.

In 1999, the California Legislature exercised this sovereignty by enacting Section 354.6, an emergency measure that extends the limitations period for a defined class of claims relating to forced or slave labor performed prior to and during World War II.

Statutes of limitations are creatures of legislative grace, subject to a relatively large degree of legislative control. *Chase Securities Corp. v. Donaldson,* 325 U.S. 304, 314 (1945). As the Court noted in *Sun Oil v. Wortman*, 486

U.S. 717 (1988), "a State's interest in regulating the workload of its courts and determining when a claim is too stale to be adjudicated certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations." 486 U.S. at 730.

Accordingly, like the statute of limitations in *Sun Oil,* Section 354.6 is a valid exercise of California's sovereign authority to assess the workload of its courts and extend its own limitations periods to the types of claims identified in Section 354.6.

The magnitude of the compelling state interests underlying the enactment of Section 354.6 cannot be overstated. The horrors suffered by petitioners and numerous other persons before and during the Second World War who were subject to slavery at the hands of private corporations has not been seen since. Hopefully, it will not reoccur in our lifetimes or those of our children. The sheer gravity of harms, and the unique place these harms occupy in history, should compel the Court, at a minimum, to rectify the Ninth Circuit's sweeping construction of the foreign affairs doctrine.[1]

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[1] The importance of this issue to the State of California is illustrated by the fact that the California Supreme Court has accepted review of California appellate decisions addressing California Code of Civil Procedure section 354.6 and the claims brought pursuant to the statute. See *Mitsubishi Materials Corp. v. Superior Court*, 106 Cal.App.4th 39, 130 Cal.Rptr.2d 734 (2003), review granted, depublished, 133 Cal.Rptr.2d 147 (2003); *Taiheiyo Cement Corp. v. Superior Court*, 105 Cal.App.4th 398, 129 Cal.Rptr.2d 451 (2003), review granted, depublished, 133 Cal.Rptr. 2d 147 (2003).

The California Legislature, recognizing the unspeakable anguish suffered by these slave laborers, exercised its sovereign powers in enacting a law that extends the limitations period and provides a forum in California courts for claims for lost wages and personal injury suffered by these slave laborers. As noted above, the State of California acted wholly within its sovereign powers in regulating its limitations period. *Sun Oil v. Wortman*, 486 U.S. at 722.

An equally compelling state interest underlying the California Legislature's actions was its desire to ensure that companies doing business within California, who avail themselves of the benefits of California's economy, compensate workers such as the slave laborers who toiled for those companies before and during the Second World War.

Despite these compelling state interests and California's legitimate exercise of its sovereignty, the Ninth Circuit invalidated Section 354.6, based upon a novel and highly questionable application of foreign affairs preemption.

Rather than applying the various tests set forth in *Zschernig v. Miller*, 389 U.S. 429 (1968), and without the guidance of *Garamendi*, the Ninth Circuit interprets the foreign affairs provisions implicit in the Constitution as primarily concerning war or designed to prevent war. 324 F.3d at 711. Although the Ninth Circuit characterizes "the power to make and resolve war, including the resolution of claims arising out of such actions," as a subset of the foreign affairs powers, it impliedly rejects the nuanced analysis of foreign affairs preemption previously articulated by this Court in *Zschernig*. *Id.* at 712. Instead, the

Ninth Circuit sweepingly declares off-limits to the States "matters related to war . . . ," without analyzing the nexus of the state regulation to foreign affairs, the impact of the regulation upon foreign affairs, and the existence of any conflicting federal treaty or statute. *Id.*

The State of California respectfully submits that this "matters related to war" standard is rife with ambiguity. Unless rejected or clarified, it will result in an unwarranted erosion of state sovereign powers, in areas of traditional state competence.

II. THIS CASE PRESENTS AN OPPORTUNITY TO FURTHER CLARIFY THE FOREIGN AFFAIRS DOCTRINE ON A MATTER OF HISTORIC IMPORTANCE.

In addition to the confusion and disharmony created by the *Deutsch* court's decision, certiorari is warranted because these cases present an opportunity for the Court to clarify the foreign affairs preemption doctrine. In *Garamendi*, the Court's most recent treatment of this still unsettled doctrine, the Court ruled based upon the facts presented it, leaving for another day questions regarding the full scope of this doctrine.

Specifically, in *Garamendi,* this Court addressed California's Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"), Cal. Ins. Code §§ 13800 et seq., which required any insurer doing business in California to disclose information about all policies the business or anyone related to the business sold in Europe between 1920 and 1945. Finding an actual and "sufficiently clear" conflict between the terms of the HVIRA and the President's foreign policy as expressed in executive agreements such as the German

Foundation Agreement and in statements by high-level Executive Branch statements, the Court held that the reporting provision at issue in HVIRA was preempted under the foreign affairs doctrine. *Garamendi*, 123 S.Ct. 2374, 2390-2392. The Court thus based its decision on conflict preemption within the foreign affairs doctrine, without needing to resolve the larger question of what standard to apply in the absence of an actual conflict.

Because it recognized an actual conflict, this Court in *Garamendi* appropriately deferred for another day the "fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions, . . . " *Garamendi*, 123 S.Ct. 2374, 2389 (footnote omitted).

In contrast, all petitioners in these cases now before the Court assert there is no conflict between their claims and any treaties or executive agreements. Indeed, in none of these cases is the German Foundation Agreement, relied upon by this Court in *Garamendi,* applicable.

Accordingly, these cases present the Court with the opportunity to complete the foreign affairs analysis it began in *Garamendi*. In doing so, the Court can and should address the appropriate standard to apply where, unlike the facts presented in *Garamendi*, a "sufficiently clear" conflict is not present. In this manner, the Court can clarify *Zschernig's* current relevance in defining foreign affairs preemption.

CONCLUSION

For the foregoing reasons, the State of California respectfully urges the Court to grant certiorari.

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No. 02-1776

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IN THE

Supreme Court of the United States

LESTER I. TENNEY, *et al.*,

Petitioners,

v.

MITSUI & CO., LTD., MITSUI & CO. (USA), INC., MITSUI MINING CO. LTD., and MITSUI MINING USA INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR JAPAN RESEARCH POLICY INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTRODUCTION

This brief[1] is submitted on behalf of the Japan Policy Research Institute (herein "*Amicus*"). The purpose of this *amicus curiae* brief is to urge the United States Supreme Court to grant *certiorari* of *Deutsch v. Turner*, 317 F.3d 1005, *as amended*, at 324 F.3d 692 (9th Cir. 2003) ["*Deutsch*"].[2]

This is a case of first impression in that the United States Supreme Court has never reviewed the issue of whether the Multilateral Treaty of Peace with Japan [1952] 3 U.S.T 3169, TIAS 2490 (1951) ("the 1951 Treaty")[3] abrogates the right of private United States citizens to sue private persons (including private business entities) for redress of personal injuries.

Petitioners are private citizens, former World War II American Prisoners of War, who were enslaved by private, wholly nonnationalized, Japanese companies for the private profit and enrichment of those wholly private Japanese companies who used Petitioners for the pursuit of the private businesses' own private enrichment. Respondents include

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1. *Amicus* states that this brief has been prepared in whole by Andrea R. Leavitt, Counsel for Japan Policy Research Institute. No person or entity, other than *Amicus*, or its counsel, have made a monetary contribution to the preparation or submission of the brief. All parties before the Court have consented in writing to the filing of this brief. A copy of that consent is submitted herewith.

2. The *Deutsch* opinion, as amended, is set forth in the Petition at pages 1-a through 68-a, and is incorporated herein by reference.

3. The full text of the 1951 Treaty is set forth in the Petition at pages 87-a through 121-a, and is incorporated herein by reference.

Mitsui, Mitsubishi, Nippon Steel, Ishihara Sangyo, and their related business entities. Petitioners have sued those companies, who also are global, private enterprise conglomerates doing business in California, to disgorge the profit they derived from Petitioners' slave labor.

Petitioners filed their suit in accordance with California Code of Civil Procedure Section 354.6, which expressly extends the statute of limitations for filing claims involving slave and forced labor during World War II. However, based upon its interpretation of the Multilateral Treaty of Peace with Japan [1952] 3 U.S.T 3169, TIAS 2490 (1951) ("the 1951 Treaty")[4] the Ninth Circuit's decision in *Deutsch*, *supra*, *denies* Petitioners their right to seek redress under Section 354.6.

Amicus could not find any American peace treaties that have been interpreted to deny the right of private individuals to pursue redress of personal injuries against private persons for torts and private profit, and does not believe that the United States Supreme Court has ever addressed that issue. Moreover, *Amicus* believes that the Supreme Court has never determined the issue of whether any United States treaty has abrogated a state-authorized right of a private United States citizen to sue another private person[5].

---

4. The full text of the 1951 Treaty is set forth in the Petition at pages 87-a through 121-a, and is incorporated herein by reference.

5. The ironic, disparate, and unintended result of *Deutsch* and *Taiheiyo Cement Corp. v. Superior Court*, 105 Cal. App. 4th 398, 129 Cal. Rptr. 2d 451 (2003) is that plaintiffs, such as Korean born *Taiheiyo* plaintiff Jeong, who during World War II were citizens of countries that were not signatories of the 1951 Treaty, will be allowed to proceed with suit for the identical injuries as the *Tenney* Petitioners,

(Cont'd)

The *Deutsch* decision is inconsistent with public policy that permits states to regulate the rights of their citizens to sue private persons in the United States or abroad. In addition, the Deutsch decision is inapposite to the California Court of Appeal decision in *Taiheiyo Cement Corp. v. Superior Court*, 105 Cal. App. 4th 398, 129 Cal. Rptr. 2d 451 (2003) (review granted), which holds that the California statute is constitutional. The *Deutsch* court is not entitled to ignore the "principal expositors of State law" — state courts. *Moore v. Sims*, 442 U.S. 415, 429 (1979). *Taiheiyo* also finds that the 1951 Treaty is not a bar to an action by a private citizen.

Amicus respectfully submits its brief, so as to provide this Honorable Court with additional grounds and information supporting grant of the Petition for a Writ of *Certiorari* in the case of *Lester Tenney, et al. v. Mitsui & Co. (USA), Inc., et al.* ("*Tenney*") [Docket No. 02-1776], to settle important questions of law, furthering the interest of justice and uniformity of legal decision.

(Cont'd)

who will be foreclosed by virtue of being United States citizens during World War II. Another similar, and ironic result is that as a practical matter, the *Deutsch* decision favors human rights violations against American military personnel, including by tacitly favoring the economic interests of wealthy foreign corporations, for whom restitution which not be overly oppressive, over the rights of enslaved United States citizens. In essence, the opinion condones violations of the Geneva Conventions by private foreign companies. The instant cases before the Court beg the question of whether, as our national public policy, in sending our troops to wars and other foreign actions, we will not champion their rights or protect them, so long as their maltreatement is by private foreign persons and foreign corporations, and begs the question of whether, through decisions like *Deutsch*, we are exposing our military to exploitation and economic duress as a foreign slave labor force, while knowingly depriving them of the benefits of the Geneva Conventions.

STATEMENT OF INTEREST

Amicus is a completely independent, nonprofit, nonpartisan, public policy organization whose focus is to serve as a national resource and information base for those formulating policy responses, and to promote the understanding of Japan's political economic behavior and importance in world affairs and trans-Pacific international relations. *Amicus* is funded solely by membership dues, and does not take funds from either Japanese or American corporations. Its officials serve *pro bono publico* without salary. Its concept is not to spend time raising money but rather not to need it. Its reputation rests on three pillars: the reputations and integrity of its board of advisers, the fact that it cannot be bought, and the quality of its publications and conferences.

Amicus organizes national and regional forums and policy conferences for discourse by academicians, government officials, journalists and business leaders to analyze and discuss matters of current import to the U.S.-Japan relationship and to review significant issues in Japan's domestic and international affairs. *Amicus* also publishes and distributes papers, articles, and other publications concerning Japan's political economy. One of *Amicus*' activities is to promote serious empirical and inductive research, as distinct from the formal theory dispensed by university social science departments.

Amicus' interest in the case at bar is *Amicus*' belief that, rather than being solely a matter of domestic law and internal domestic affairs, *Deutsch* has far-reaching global impact beyond our borders, warranting the utmost scrutiny and Supreme Court review, because the decision in *Deutsch*

effectively establishes, defines, or amends United States global policy regarding the treatment and rights of American citizens, and the equities and balance between private economic industrial interests and private individuals.

The issue central to the *Deutsch* decision is of especial contemporary relevance with the increased interjection of United States' troops into global conflicts in a variety of capacities, including as "monitors", consultants, combatants, and peacekeepers, and exposing them to capture and detention as Prisoners of War. *Deutsch* may be negatively interpreted to mean that U.S. policy permits hostile governments to loan or give American Prisoners of War, and others, for the enslavement, exploitation, and enrichment of private persons with impunity.

REASONS FOR GRANTING THE PETITION

Certiorari is necessary for the following reasons:

1. to determine whether the 1951Treaty abrogated the rights of private citizens (Prisoners of War) to sue other private persons for personal injuries sustained;

2. to resolve the rights of states to enact laws for the protection and rights of their citizens;

3. to resolve the rights of private persons (Prisoners of War) to sue other private persons who are foreign non-governmental entities, who may exploit or who have exploited the individual citizens for private financial enrichment; and

4. to protect United States' military and other United States citizens from human rights violations, including their enslavement for private economic profit.

This is a case of first impression in that the United States Supreme Court has never reviewed the issue of whether the 1951 Treaty with Japan took away the right of private United States citizens to sue private persons (including private foreign business entities) for redress of personal injuries, and the Supreme Court may never have determined the issue of whether any United States treaty has taken away that right.

In denying Petitioners' right under California law to sue solely private persons for recovery for personal injuries, the basis for the Ninth Circuit ruling in *Deutsch* was that court's reasoning that the 1951 Treaty precluded private citizens from bringing tort claims against private Japanese companies. *Amicus* believes that the basis for the Ninth Circuit's ruling was erroneous.

Scrutiny of the 1951 Treaty discloses no express or implied intention to preclude common law tort claims for personal injuries incurred by American slaves from the conduct perpetrated against them by private Japanese corporations who enslaved them during World War II. Rather, the 1951 Treaty's immunity protection is specifically and expressly limited to claims against:

> Japan and its nationals arising out of acts taken by Japan and its nationals *in the course of the prosecution of the war*.

1951 Treaty, Paragraph 14(b), *supra*, 3 U.S.T. at p. 3183 (Emphasis added). A review of Petitioners' claims reveals

that Petitioners have not made any claims, nor sought to recover, against "Japan and its nationals arising out of acts taken by Japan and its nationals *in the course of the prosecution of the war*".

The claims before this Court are those of American citizens who were enslaved during World War II by Japanese companies (and their related business entities, and which include American corporations) for acts by those Japanese private, business enterprises *for unjust economic enrichment from the American slave labor*[6], not for the prosecution of war — but rather the enslavement of a free labor force so as to derive a private, financial, business profit. The *Deutsch* Petitioners seek disgorgement of Respondents' economic profits from Petitioners' slave labor.

Certiorari is warranted to resolve the appropriate analysis of federal preemption with regard to Section 354.6, as applied to the cases at bar. The *Deutsch* court ruled directly in contravention of the decision by the California Court of Appeal for the Second District in *Taiheiyo*, *supra* n.5, an action by a plaintiff who was a Korean national at the time of World War II. That appellate court held that Section 354.6 is procedural in nature only, is not preempted by treaty or other law, and that it imposes, at most, merely an incidental or indirect effect on foreign relations. The California Court

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6. Article 31 of the Geneva Convention Relating to the Treatment of Prisoners of War, 47 Stat. 2021, T.S. 846 (1929), allowed Prisoners of War to be forced to do labor, but *expressly precluded* such labor from having any connection with the operation of the war. Thus, Respondents will be hard-pressed to argue that their actions were undertaken "in the course of the prosecution of the war" without expressly admitting a violation of the Geneva Convention, a concession that Respondents have yet to make.

of Appeal in the Fourth District decision of *Mitsubishi Materials Corp. v. Superior Court*, 106 Cal. App. 4th 39, 130 Cal. Rptr. 2d 734 (review granted) found the statute to be substantive and not procedural[7], but did not rule on the issue of preemption. *Id.*, 106 Cal. App. 4th at 59, 130 Cal. Rptr. 2d at 749. The *Deutsch* decision ignored the rights of states to interpret state statutes in the first instance, violating basic precepts of federalism. In addition, the Deutsch decision directly conflicts with the California state appellate decision in *Taiheiyo*, *supra*, which holds that the California statute is constitutional, and that the 1951 Treaty is not a bar to an action brought by a plaintiff who was a Korean national at the time of his enslavement. The Deutsch court is not entitled to ignore the "principal expositors of State law" — state courts. *Moore v. Sims*, 442U.S. 415, 429 (1979). The *Deutsch* decision should be set aside on both of these grounds.

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7. The California Supreme Court has granted Petitions for Review in *Mitsubishi Materials* [*Mitsubishi Materials Corp. v. Superior Court*, 133 Cal. Rptr. 2d 147, 2003 Daily Journal D.A.R. 4798 (Cal., Apr 30, 2003) (NO. S114470)] and *Taiheiyo Cement* [*Taiheiyo Cement Corp. v. Superior Court*, 133 Cal. Rptr. 2d 147, 66 P.3d 1231, 2003 Daily Journal D.A.R. 2776 (Cal., Apr. 30, 2003) (NO. S113759)] to resolve this conflict.

CONCLUSION

The novel issues presented by *Deutsch* have significant, direct, and immediate impact on United States' public policy regarding the balance of the economic interests of wealthy foreign corporations against the rights of United States' citizens, as well as on the United States' support of its Armed Forces enslaved by private persons.

Grant of *certiorari* is necessary to address and resolve disparities in application of preemption analysis, as well as the authority of the states to grant their citizens the right of redress for tortious injuries. Review is necessary to determine the United States public policy regarding human rights violations against their citizens, and in particular our troops, not only by sovereign foreign nations, but by private foreign persons.

Amicus respectfully requests that this Honorable United States Supreme Court grant Petitioner Lester Tenney's Petition for a Writ of *Certiorari* and to reverse the decision of the Court of Appeal of the Ninth Circuit.

Respectfully submitted,

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